POLITICAL ECONOMY AND CONSTITUTIONAL REFORM

HEARINGS

BEFORE THE

JOINT ECONOMIC COMMITTEE
CONGRESS OF THE UNITED STATES

NINETY-SEVENTH CONGRESS

SECOND SESSION

PART 1

NOVEMBER 9, 17, 18, AND DECEMBER 16, 1982

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FOREWORD

By Hon. Henry S. Reuss, Chairman

The Joint Economic Committee's hearings on Political Economy and Constitutional Reform, along with the papers and other material published in the Appendix, contain the observations and recommendations of some of the most thoughtful critics of the American political system today. During three days of hearings in November 1982, the Committee brought together more than a dozen academics, journalists, and former government officials and lawmakers to discuss how we could improve the performance of our political system, and the performance of our economy, by making changes in the structure of our government and, if necessary, in our Constitution.

The Appendix complements these hearings by making available in one place a wide variety of other material on these same issues, culled from books, academic and law journals, popular magazines, and other sources. I hope these two volumes will be useful to those who believe that our democracy can be made to work better.

* * * * * * *

In 1987, the United States will celebrate the bicentennial of our Constitution. It was a marvelous document 200 years ago, and it remains a marvelous document today. It marked the first time a Nation created itself and its people set the rules of government. As Henry Steele Commager testified:

> Their achievements, then and in later years, cannot but fill us today with awe. They did indeed bring forth a new nation—the first time men had ever deliberately done that . . . Ours was, at the beginning, the most enlightened, the most mature, and the most inventive and innovative of all governments on the globe . . . What a sobering fact that every major political and constitutional institution which we now boast was created before the year 1800 and not one has been created since.

In our Constitution, the Founding Fathers created a structure of government based on the separation of powers between President and Congress and a system of deliberate checks and balances; judicial review of acts of Congress; popular election of the President and Congress; a constitutional amendment process; and a Federal system with powers and responsibilities shared by the national and state governments. It is a structure that has generally served our Nation well through its various stages of growth, from undeveloped backwater to powerful industrial nation, from amalgam of former colonies to world leader.

In these 200 years, the Constitution has weathered many crises. Our form of government has endured wars and depressions which would have destroyed other governments around the world. We are fond of our form of government, and we have done well under it.

But during the past decade, our government has often seemed paralyzed as the economy had been battered by one crisis after another. The separation of powers between the President and Congress, the decentralization of power in House and Senate, the decline of the parties, and the rise of the media politician have undermined the ability of our government to respond effectively. Through three recessions, two oil-crises, two periods of prolonged inflation, and three periods of skyrocketing interest rates; through an entire decade of low productivity growth, inadequate business investment, stagnant output, and falling real incomes—our government stood helplessly by, unable to develop or implement effective economic policies.

The just-concluded lame duck session of the 97th Congress illustrates the paralysis. The session convened with a mandate from the November 2 election to address the Nation's crisis of recession and unemployment.

By any fair estimate, the lame duck session failed. It failed to make contact with the looming out-year budget deficits, either by checking the growth in military spending or the decline in tax revenues. It failed to enact even a token public works and jobs program. (Its one "jobs" enactment, the 5-cent gasoline tax increase, will subtract more jobs than it adds.) Finally, toward the end, in an unedifying debate about the size of trucks, the session failed even to keep the government open and operating.

This is stalemate—stalemate by fear of Presidential veto, stalemate by Senatorial filibuster. December 1982 reduced the confidence of the American people in their government.

* * * * * * *

Those who love fishing know well that the secret of success is proper structure—a waterlogged stump, a pile of rocks, a steep drop-off. If the structure is right, you will catch fish.

As in fishing, so in life. Particularly in politics and economics, good structure is necessary for good policies.

Until very recently, our political and economic structure was a source of strength. Our constitutional system of checks and balances, of divided sovereignty and separated powers, worked. So did our economic system of free enterprise tempered by concern for human welfare and by a governmental undertaking to assure sufficient demand to buy what could be produced.

But no longer. In government, for more than a decade, the judgment of the people is that President and Congress have been failing.

Back in 1966, almost 42 percent of the American people said they had a great deal of confidence in the Congress and the President; by 1979, less than 18 percent felt any such confidence, according to a Lou Harris poll. And, except for the slight increase registered in the 1982 mid-term election, participation in elections has been steadily declining.

In economics, nearly full employment without inflation has given way to disastrous bouts of escalating prices, prolonged joblessness, and impossibly high interest rates.

A leading reason for these miseries is deteriorated structure. If the passage of the years rearranges the rock piles on your favorite fishing lake, it may cease to meet your expectations. And, if the ravages of time and man have caused malfunctions in our political and economic structures, this may contribute to our present discontents. As Senator Claiborne Pell writes:

> Our government is not responding as effectively as it should to the serious problems and challenges that confront our Nation and the American people in a rapidly changing world.
>
> Increasingly, our government's best efforts to deal effectively with such problems as inflation, energy supply, productivity, or arms control, to cite a few important examples, end in a stalemate among conflicting views and divided interests.
>
> The result, all too often, is inaction, policies warped or diluted beyond recognition, and ultimately, frustration, stagnation, and a diminished public respect for government itself.
>
> In my view, the sluggish response of our government to the major challenges facing our Nation is not a judgment of the ability of any President or of the Congress and its leaders or of the Supreme Court. Nor is it a question of political party. It is instead a judgment of how well this government as an institution responds to clearly identifiable, major problems as they arise.

Our Constitution envisages the separation of powers between the executive and legislative branches of government. The Founding Fathers broke with the parliamentary tradition of drawing the executive from the legislature for what was then a good reason—to prevent the kind of executive tyranny which led to the American Revolution. As James Sundquist told us:

> When the Founding Fathers met in Philadelphia in the summer of 1787, they were preoccupied with the threat of tyranny. Having won freedom from the despotism of George III, and having experienced arbitrary rule from some of the new state legislatures, they were resolved that the Constitution they were drafting must protect the young republic against the concentration of governmental power. So they dispersed the powers of government—dividing them first between a Federal Government and the states; then at the national level between separate legislative, executive, and judicial branches; finally, within the legislative branch, between two independent bodies, a Senate and a House of Representatives.
>
> This unique structure of "separation of powers," of "checks and balances," has served well the purpose of averting tyranny. In its nearly 200 years under the Consti-

tution, the republic has never been menaced by autocracy in any form.

How ironic, then, that the very mechanism which for 200 years has so successfully preserved our liberties looms today as an almost overwhelming impediment to effective government. Sundquist continues:

> A governmental structure deliberately designed to frustrate a despot who seeks to assemble its powers for evil purposes must also, inevitably, frustrate democratic leaders who have been chosen by the people to exercise its powers for good and worthy ends.
>
> That is the dilemma of the American constitutional system. The checks and balances created in the Eighteenth Century to guard against the perils of that day have led repeatedly, in the Twentieth Century, to governmental stalemate and deadlock, to an inability to make quick and sharp decisions in the face of urgent problems. Rash and impulsive governmental actions are deterred—and that is a benefit—but one gained often at the cost of an incapacity to act at all, or at least to act in a timely and decisive fashion. And, when stalemate occurs, the people have difficulty holding anyone accountable. The President blames the Congress; Members of Congress blame the President and one another; and amid the recriminations people lose confidence in government altogether.

Take, for example, the progress of the Reagan Presidency. It began with a euphoria of legislative achievement. Congress enacted the President's program virtually without change—the Economic Recovery Tax Act made major cuts in tax rates for individuals and gave many new breaks to businesses, the 1981 Budget Reconciliation Act cut spending for almost every social program, and the defense buildup accelerated spending on the machinery of war. The historian Arthur Schlesinger, Jr., cited this as evidence that the separation of powers is no impediment to successful government:

> . . . these conditions—the separation of powers and all the rest—have not prevented competent Presidents from acting with decision and dispatch throughout American history. The separation of powers did not notably disable Jefferson or Jackson or Lincoln or Wilson or the Roosevelts. . . . The real difference, I submit, is that Presidents who operated the system successfully knew what they thought should be done—and were able to persuade Congress and the Nation to give their remedies a try. That possibility remains as open today as it ever was. In his first year as President, Mr. Reagan, who knew what he thought should be done, pushed a comprehensive economic program through Congress—and did so with triumphant success in spite of the fact that the program was manifestly incapable of achieving its contradictory objectives.

Yet today the Reagan economic program is in disarray. The President presently submits little legislation to Congress, and gets little. He has suffered defeat on important issues, such as the MX missile. His apparent loss of the mid-term election has eroded his ability to dominate the House of Representatives. The Senate, while nominally Republican, is becoming less docile by the day. While there is still a possibility that President Reagan could adjust to changed reality and work effectively with Congress, many predict that the Reagan Presidency will go the way of the Carter Presidency, with President and Congress living in two separate worlds, with Presidential initiatives stillborn, with the government paralyzed in time of crisis.

Despite this fissure in the relationship between President and Congress, despite checks and balances and built-in tensions, government seemed to work for most of our history. This was due to an institution not even mentioned in the Constitution—the political party. The party came to act as a bridge between executive and legislature. When stalemate loomed, the party could always be relied upon to come to the rescue. Furthermore, the party label told the voter most of what he needed to know about where candidates stood on the issues of the day and how they would probably vote.

But, in the last decades, the influence of the parties has greatly declined. Civil service reform has reduced the power of the spoils system to generate party loyalty, while the growth of government income security programs has undermined the influence of City Hall favors. Parties that used to reinvigorate themselves every four years by selecting their Presidential candidate during conventions of the party faithful have increasingly been bypassed in the open primaries now used in more than half the states to select convention delegates. And the emergence of Political Action Committees as pivotal sources of money for skyrocketing congressional campaign costs has strengthened the influence of single-issue special interest groups at the further expense of the national political parties.

Along with the decline of party cohesiveness came the rise of the freelance candidate. Jimmy Carter and Ronald Reagan are leading examples of outsiders who gloried in their outsiderness to capture a party's Presidential nomination. Congress is increasingly filled with freelancers rather than party people, political entrepreneurs whose use of television, computerized mailings, and unlimited special interest campaign contributions makes them impervious to the party and its discipline. The Democrats have their "boll weevils," the Republicans their "gypsy moths," and both have their mavericks who deviate at will from party positions.

Douglas Dillon testified on the decline of the parties:

> In earlier days, Members of Congress were elected and sent to Washington to represent their constituencies. Communication was slow and there was no way in which the Congressman or Senator could ascertain the views of his constituents on the many individual matters that would require decision while in Washington. Members of Congress were chosen because of their philosophic approach to government or more rarely because of their views on some one dominating issue of the day. Because of this, political parties developed that had a certain cohesiveness and that gave the voters a relatively clear idea of where their Mem-

> bers stood on the issues. Thus, party government in the first 150 years of our national existence was not too different from that in parliamentary governments. The power of the executive was held in check, but the basic programs of the President and his party were generally enacted. There were exceptions, of course, such as the rejection of the League of Nations after World War I. But these were exceptions, not the rule.
>
> Things began to change after World War II. Because of faster means of travel, Members of Congress spent more time at home, in their districts, and, because of the telephone and the news media, they were in constant touch with constituents who were informed on a day to day, if not an hour to hour, basis as to developments in Washington. Gradually but steadily there was an erosion in party loyalty. Political parties began to lose their ideological identities. We are all aware of the profound differences between the thinking of elected southern Democrats and their colleagues from the big cities of the North. And similar differences arose between Republicans elected to office in the East and those coming from the middle and far West.
>
> So what do we have today? We have Members of Congress who return to their districts regularly, when possible every week—Members who are in close touch with the vocal elements in their districts and who, of necessity, put the expressed interests of such constituents ahead of any broader national or party interest.

As a result, the government of the United States finds it difficult to govern the Nation. As Lloyd Cutler has written:

> A particular shortcoming in need of a remedy is the structural inability of our government to propose, legislate, and administer a balanced program for governing. In parliamentary terms, one might say that under the U.S. Constitution it is not now feasible to "form a government." The separation of powers between the legislative and executive branches, whatever its merits in 1793, has become a structure that almost guarantees stalemate today. As we wonder why we are having such a difficult time making decisions we all know must be made, and projecting our power and leadership, we should reflect on whether this is one big reason.

* * * * * * *

The bicentennial of our Constitution in 1987 gives us an opportunity to ask whether constitutional changes are needed to repair the rickety condition of our governmental structure.

Our witnesses differed substantially in their responses to this suggestion. Senator Hugh Scott testified that the fault lies not in the structure but in ourselves:

> . . . there is no greater delusion . . . than the idea that we can solve substantive problems by changing structure. . . . I think the ultimate answer then is not to re-

structure the Congress, but to seek, if we can, through information and through establishment of standards and with the help of the media, perhaps to restructure the people who make up the Congress and the Executive.

Elliot Richardson would prefer that we develop better policies:

> The fault, in my view, is neither in our stars nor in our structures, but in our policies or the lack of them. There is no indication, so far as I am aware, that transcendence of checks and balances of our system would have produced a better result at this date. . . . And so I am an advocate of the development of more adequate data collecting and analytic capacity on the part of the government, a coordinated effort to build better models for the understanding of current and long-term trends in order to focus future policies on the correction of tendencies that seem to be indicated by the best available data and the most careful possible analysis.

They may well be right. But those who argue for a change in structure deserve their day in court.

Our witnesses made suggestions for constitutional changes along three lines: adoption of a parliamentary system; changes in the terms of the President and Members of Congress and in the conditions under which they hold office; and changes in the way congressional elections are financed. Numerous recommendations for changes in the structure of government that would not require constitutional amendment were also made.

* * * * * * *

Whenever constitutional change is proposed, one hears pleas for the parliamentary system, in which legislative-executive cooperation is assured because legislature and executive are in effect one. Under the parliamentary system, the parliament picks the prime minister and the cabinet from among its own members. Legislature and executive can each topple the other and call an election. Party discipline is generally strong, party programs are clearly defined, and the voters know who is responsible for formulating and carrying out policies.

The Congressional Research Service of the Library of Congress has described the differences between parliamentary and presidential forms of government:

> The parliamentary system lacks the separation of powers, between legislative and executive, characteristic of the American. The American President's authority is independent of the will of Congress; the cabinet is not only appointed by, but removable by, and hence responsible to, the President rather than the legislature. Congress' power to remove by impeachment is an exception, but it is settled doctrine in the United States that policy disagreement in itself is not grounds for impeachment. In the typical parliamentary system, by contrast, the executive is formally dependent on the legislature for the continuance of its authority to govern; there is no basis of executive authority

independent of the legislature's mandate. The parliamentary executive is, accordingly, routinely subject to the possibility of removal on grounds of policy disagreement.

This arrangement contrasts with the American in making impossible for a parliamentary system the phenomenon known in the United States as "divided government," in which the legislature and executive are controlled by different parties, espousing different programs. The executive in a parliamentary system will not be installed in the first place unless the policies it proposes to prosecute can command support of a legislative majority, and if they cease to command that support, it will cease to be the executive. In the United States, conversely, neither branch can vitiate the control of the other branch by its opponents on policy matters; in the case of disagreement, the only ways of proceeding are either in deadlock or through mutual adjustment. . . .

The basic principle of parliamentary government, that the executive is dependent on the legislature for the continuance of its authority to govern, is also the force that fosters another feature common in such systems: the presence of strong, well-defined legislative political parties. "Strong" here means well-disciplined; that is, a party's legislative representation will reliably support party positions in legislative voting. "Well-defined" means that there are explicit and agreed party positions for its legislative representatives to support.

These two features of parties tend to develop together in a parliamentary system. The incentive for members of the majority party or coalition to vote consistently for the government is strong where, in the absence of such voting, the government may fall and one's own party thereby be swept from power. At the same time, legislators will be unwilling to sustain a government in power that will not pursue the policies for which they installed it in the first place. . . . The political necessity of retaining a majority on important issues as a prerequisite for retaining power strongly impels the emergence of disciplined, programmatic parties. . . .

A prime minister who has lost a vote of confidence may declare the legislature dissolved (or ask the head of state to do so), thus making new elections necessary. This power clearly adds a further incentive for party discipline, for members of a legislative majority will be less inclined to vote against the government when doing so risks bringing on an election in which their majority might be lost. . . .

The power of dissolution also contributes to partisan programmatic coherence, for an election following the defeat of a government on a given issue will often turn on that issue and become a kind of referendum. The voters will be offered a clear choice of policies defined by the actual positions of the parties in the recent legislative struggle, and will have every reason to expect that the party returned with a majority will act on the basis of that actual posi-

> tion. To the extent that each legislative party is a bloc unified in support of an avowed general program, elections not brought on by a vote of no confidence also tend to turn on those programs. Since the nature of the parliamentary system encourages this legislative programmatic unity, in ways already discussed, the electorate in a parliamentary system is likely to have the chance much more frequently to make clear policy choices in casting their votes.

Some of the witnesses who appeared before the Joint Economic Committee hold strongly that the United States should formally adopt a parliamentary system of government. I do not view a full adoption of the parliamentary system as a realistic option for the United States. Our presidential-congressional system, for all its flaws, is like an old shoe—it has given good service and it is comfortable. It is very difficult to imagine two-thirds of the Congress and three-fourths of the state legislatures voting to junk the American system of government for another that is new and unfamiliar.

But short of a complete change in our constitutional system, there are amendments to the Constitution of a considerably milder nature which might contribute to curing the structural defects which beset us and provide some of the benefits of a parliamentary system. These proposals were discussed extensively during the Joint Economic Committee's hearings.

1. *Vote of No Confidence.*—This proposal would authorize Congress to adopt a resolution of no confidence in the President, which would cause the immediate removal of the President and mandate a prompt new presidential and congressional election. In a variation of this proposal noted by James Sundquist, the President could also be empowered to dissolve Congress in the event of a serious policy deadlock, resulting again in new elections for both. The mere existence of this possibility would force Congress and the President to work much more closely since their fortunes would be thoroughly enmeshed.

2. *Permit Members of Congress To Serve in the President's Cabinet.*—This proposal would create a bridge between the executive and legislative branches by allowing the President to select some of his top cabinet and other officers from the Congress. This would be accomplished by repealing the proscription contained in Article I, Section 6, against Members of Congress serving as so-called "officers" of the United States. James Sundquist observed: "Many of the disputes between the branches that now so often paralyze the government would be automatically averted, since the same officials would have key responsibilities both as administrators and as legislators." Variations on this proposal would permit members of the President's cabinet to appear on the Floor of the House and Senate, to participate in debates, and even to vote or chair committees.

3. *Strengthening Parties Through the Election Process.*—This proposal would require voters to cast a single ballot for President and Vice President, as is now done, plus the candidate of the same political party for the House of Representatives. Senatorial candidates during presidential election years would also be added to the

single ballot. This would bind together the electoral fate of each party's candidates and give them a strong incentive to support each other during campaigns and while in office. In addition, it would greatly reduce the incidence of split government.

* * * * * * *

Structural changes unrelated to the parliamentary system were also proposed.

The four-year term for Presidents is too short, it is argued, because it provides too little time for a President to enact and carry out his program, especially since the last year of the term is usually devoted to running for reelection. In addition, the campaign for reelection forces the President to focus too much attention on his own fortunes and not enough on the needs of the Nation. The suggested solution is to set a six-year term for the President and prohibit him from running for reelection. Senator Lloyd Bentsen testified in support of this proposal:

> Presidents would have more opportunity to wrestle with basic economic problems and less incentive to attempt to shape economic trends into election year assets. And, so would the Congress. A single-term President would inevitably have a better chance to think objectively, examining proposals more on their merits and less on their potential to do him political good or political harm . . . With no necessity to be diverted by primary campaigns and the many other absorbing aspects of national politics, a single-term President could give more time and attention to the job. He could deal in more candid terms with Congress, the media, and the people. A President talking frankly about the problems would inevitably gain credibility. And this candor would strengthen his capacity for leadership and his ability to stimulate confidence. In complex times, the stimulation of confidence is the most urgent task of political leadership.

This proposal is often linked with a similar proposal to increase the term of office of Representatives to three or four years. Its proponents believe that congressmen would exhibit greater courage and devote more time to legislation if their electoral exposure is only once every three or four years rather than once every two years.

* * * * * * *

Another nonparliamentary proposal to improve the functioning of government would be one that enabled Congress to place some reasonable limits on what candidates for President and Congress can spend on their campaigns. The Supreme Court ruled, in the 1976 case of *Buckley v. Valeo,* that Congress could place spending limits only on candidates who elected to accept public financing of their campaigns; any further proscription would violate the constitutional guarantee of free speech. Since Congress has so far been unwilling to pass legislation providing for the public financing of congressional elections, no limits on spending apply at all to candidates for the House or Senate.

The extraordinary cost of running a political campaign today—the total cost of the 1982 midterm election came to somewhere around $300 million—gives the moneyed political action committees an undue influence over the election process and reduces respect for the legislative process. Few candidates for office can afford to turn down PAC contributions, but the Nation can scarcely afford the damage to public policy caused by this need to court campaign money.

Placing reasonable limits on campaign spending seems no more a violation of freedom of speech than to forbid movie patrons to yell "fire" in a crowded theater. The capacity of seat-buying to ruin a democracy is surely one that the Court ought to weigh in a freedom-of-speech decision.

The Supreme Court may one day reverse its decision in *Buckley v. Valeo.* This would certainly be simpler than the process of constitutional amendment.

Short of a constitutional amendment, former Congressman John Anderson made a number of recommendations for controlling the financial power of special interest groups and their PAC's, including public financing for Senate and House candidates modeled after the Presidential system, limiting contributions of PAC's to the same $1,000 ceiling currently imposed on individuals, and enactment of a fairness rule that would require all radio and TV stations that accept political advertisements from independent PAC's not formally part of a candidates campaign to provide equal time for rebuttal at no cost.

* * * * * * *

Although the Joint Economic Committee's hearings were called to consider the constitutional changes needed to improve the functioning of our government, our witnesses suggested numerous improvements that could be made in our government within the existing provisions of our Constitution.

John Anderson, for example, urged that Congress adopt a two-year budget cycle in order to reduce election year influences on spending and to give Congress more time for its other legislative duties.

Henry Steele Commager urged that we drastically shorten the time spent on presidential and congressional campaigns, that the President be given a line-item veto, and that Congress take a more active role in the conduct of foreign affairs.

James Sundquist urged much greater use of the legislative veto, in order to give the President more discretion in setting policy while enabling the Congress to keep a necessary check on the President.

* * * * * * *

The bicentennial of our Constitution is scarcely four years away. We need a thorough and thoughtful reappraisal of our Constitution, particularly those sections which impede decisionmaking by the Congress and the President. Although a small group of Founding Fathers wrote the Constitution in 1787, the review of the Constitution between now and 1987 must be a nationwide undertaking, with results that reflect the deliberations, and command the respect, of all Americans.

These Joint Economic Committee hearings, published here, are a first step in this review of our Constitution.

During the next few years, a newly formed private group—the Committee on the Constitutional System, under the cochairmanship of Lloyd Cutler and Douglas Dillon—will conduct studies and hold public meetings on how our Constitution might be improved.

The events of the past decade—with Congress and the President at loggerheads over economic policy, and our economy reeling directionless from one crisis to another—suggest that reform of the structure of our government may be in order.

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POLITICAL ECONOMY AND CONSTITUTIONAL REFORM

TUESDAY, NOVEMBER 9, 1982

Congress of the United States,
Joint Economic Committee,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., in room 2128, Rayburn House Office Building, Hon. Henry S. Reuss (chairman of the committee) presiding.

Present: Representative Reuss.

Also present: James K. Galbraith, executive director; Louis C. Krauthoff II, assistant director; Betty Maddox, assistant director for administration; and William R. Buechner and Chris Frenze, professional staff members.

OPENING STATEMENT OF REPRESENTATIVE REUSS, CHAIRMAN

Representative Reuss. Good morning. The Joint Economic Committee will be in order for the series of hearings on Government and the Economy.

In 1987, the United States will celebrate the bicentennial of the ratification of our Constitution. It was a marvelous document 200 years ago, and it remains a marvelous document today. In it, the Founding Fathers created a structure of Government—with power and responsibility spread over three separate branches of Government—that has generally served our Nation well in all its stages of growth from undeveloped backwater to the most powerful industrial Nation in the world.

In these 200 years, our Constitution has weathered many crises and our Government has endured wars and depressions that destroyed other governments around the world. We are fond of our form of Government, and we have done well under it.

But during the past decade, our Government has often seemed paralyzed as the economy has been battered by one crisis after another. The separation of powers between the President and Congress, the decentralization of power in the House and Senate, the decline of the parties, and the rise of the media politician have undermined the ability of our Government to respond effectively. Through three recessions, two oil crises, two periods of prolonged inflation, and three periods of skyrocketing interest rates; through an entire decade of low productivity growth, inadequate business investment, stagnant output, and falling real incomes—our Government stood helplessly by, unable to develop or implement effective economic policies.

Are our economic problems insoluble? Could a political system that relied less on checks and confrontation and more on coordination and cooperation improve the likelihood of our solving them? Soluble or not, would a political system that decreased buck passing and fixed responsibility more clearly be desirable? And if our economic problems prove in fact insoluble, if unemployment and inflation continue to dog us, and if the distribution of wealth and income continues to worsen, can democratic government of any sort—dynamic or frustrated—long endure?

The hearings we begin today are unusual for the Joint Economic Committee. We go beyond our normal fare of economic policy issues to look at our Government. The witnesses who will testify are students of the governmental process who have concerns about how well it is working, and ideas about how it can be improved.

SIX-YEAR PRESIDENTIAL TERM

Our first witness today is the distinguished chairman emeritus of the Joint Economic Committee, the Senator from Texas, Lloyd Bentsen, who is freshly returned from the wars. I marvel at the freshness of your visage and cheerfulness of your outlook. We are honored to have you here today.

STATEMENT OF HON. LLOYD BENTSEN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator Bentsen. Thank you very much, Mr. Chairman. I am delighted to be back to visit with the members of this committee and congratulate you on holding these hearings. I was much impressed with the illustrious group of witnesses that I perceive will follow here. I was particularly interested in your using the term "political economy," because I believe that we are going to see that issue as the thrust of our debate in the 1980's, with the main question being how we use the resources of this country to achieve certain economic objectives. And that's particularly true in trade.

In the past, what we have seen in this country is an emphasis on regulation to protect consumers and to achieve certain social objectives. But I think you are going to see, in addition to that, this country's Government becoming involved in how we bring about a level playing field with our competitors. Our working men and women aren't just competing with the working men and women of Japan or of the European Common Market. Our companies are not just competing with the companies of Japan and of Europe. In effect, they are competing with the countries of Europe and the country of Japan, and we're going to have to really direct a lot of this debate toward finding out how we can have effective and fairer competition. So, I feel you have properly titled these hearings when you refer to the "political economy."

With that in mind, I wanted to recommend for the study of this committee an amendment that has been before the Congress for 150 years. President Andrew Jackson urged Congress in almost every message that he sent to the Congress that we change the Constitution so that Presidents would serve only one 6-year term. President Jackson wanted future Presidents to avoid being drawn into the dilemma of weighing their own political prospects against the general good of the country.

We tend to dismiss the postservice counsels of our Presidents as self-serving, but I feel it's important to note that Presidents in the 19th century and most of our Presidents in this century have urged that kind of a reform, not because it would in any way have affected their own tenures, but because they believed that wiser and firmer leadership would inevitably result. It is certainly not a partisan proposal. Dwight Eisenhower was for it; so were Lyndon Johnson and Jimmy Carter, as well as diverse Senate leaders such as Henry Clay, Mike Mansfield, Everett Dirksen, and George Aiken.

To this committee, with its special view about how politics impacts upon the economy, I submit that an election cycle extended to 6 years would give us a better chance for stability. Presidents would have more opportunity to wrestle with basic economic problems and less incentive to attempt to shape economic trends into election year assets. With this change, you wouldn't have the debate over whether the President had leaned on the Federal Reserve to try to bring down interest rates just before an election or if it really was an objective decision on the part of the Federal Reserve. You'd be stretching the President's time in office to a 6-year term and the President would not gain for himself by any such influence having been exerted.

And I think the Congress would gain by it. A single-term President would inevitably have a better chance to think objectively, examining proposals more on their merits and less on their potential to do him political good or political harm.

We have an overload factor in Government today. All of us in office wrestle with it, and it becomes particularly difficult for the White House as the reach of the Government expands and the demand for political solutions increases at the national level. With no necessity to be diverted by primary campaigns and the many other absorbing aspects of national politics, a single-term President could give more time and attention to his job. It's been said the way you get elected President today is really to be at loose ends, to be out of office so that you can devote your full time for a couple of years to campaigning, trying to survive through the primary system. And to some degree, even a President with all the trappings of power still has to spend a very substantial amount of his time campaigning for that second term, and we just shouldn't have that kind of drain on his energies or his time.

A President, therefore, serving one 6-year term, could deal in much more candid terms with Congress, with the media and the people. A President talking frankly and objectively about the problems would inevitably gain credibility. And that kind of credibility would strengthen his capacity for leadership and his ability to inspire confidence on the part of the people. In complex times, the stimulation of confidence is the most important task of political leadership.

Some say that a President elected for a single term would be an immediate lameduck, but that's not a negative point.

The truth is that the American political system works best—in fact it only works well—when there is a substantial bond of rapport between the President and the people. So long as this bond exists, the President retains his massive influence. And so long as he has influence, there can be no question of his becoming a noncontributing lameduck. That cliche developed in days when presidential influence depended heavily upon patronage. Modern Presidents gain their leverage from their ability to propound ideas that capture national support and from their projection of a sincere commitment to the Nation's well-being. Just as Dwight Eisenhower showed us in his second term, a President who wins the trust of the people will not lose it because he has to leave office at the end of his term.

Mr. Chairman, I think in addition to the old problem of patronage, which has pretty well faded out, modern-day Presidents have a new component of power, and I'm not sure that it's been fully understood yet. But the ability of a party under the direction of a President to collect vast sums of money, then to control the purse strings, award that money to campaigns and choose which candidates they want to reward is a tremendous amount of influence. When I hear about how persuasive a President is, and particularly this President, and then to understand that he also can allocate the money for campaigns and decide that they give the full funding that the law allows, I think that adds a great deal to his persuasive abilities. And I think that's an extra power that a president has not had in the past. In all candor, I think it's substantially more power than the patronage which was allocated previously to people who may or may not have been qualified.

Now, some would argue that a President elected for a single 6-year term will lock himself off in an ivory tower, maintaining a lofty stature of divided powers. A President will still be remembered, though, for what he accomplishes, and any man that fills that office is looking for some kind of recognition of a job well done. That recognition is going to provide his little bit of immortality if he can achieve it. He is going to do what he can to gain the support of public opinion and to work closely with the Congress and try to achieve objectives, as long at they are not corrupted by having to run for the second term. The reform of a single 6-year term will rescue the President from the petty intrigues with pressure groups and the diverting, time-consuming maneuvers that are unavoidably part of any effort to be renominated and reelected. The reform will give every President a far better chance to be, in Woodrow Wilson's words, "as big a man as he can."

But what, some may ask, if we elect a mediocre President? They argue that we would be stuck with him for 6 years instead of 4. Mr. Chairman, perhaps if he didn't have to worry about reelection, he would rise above mediocrity and do a better job. Some may ask, "Well, what if he's not bad enough to be impeached?" That is something of a problem, but the good Lord and the voting public have been pretty good to us, I think, over the stretch of nearly 200 years in winnowing out those kinds of candidates. Still, we all know from experience in our lifetime that the Oval Office can be captured by people who lack some of the important qualities of leadership.

But there are also additional answers to this criticism. First of all, the national parties are working very hard to improve and refine their method of selecting presidential candidates.

Elihu Root, one of our greatest statesman, made this point many years ago. He said, "You cannot separate the attempts to beat the President seeking reelection from the attempts to make inefficient the operations of government."

When we analyze the few distortions of Government, the occasions on which the broad public interest seems to have been jeopardized or ignored, invariably we find that responsible officials had their eyes on the next election.

It doesn't have to be that way.

Thank you very much, Mr. Chairman.

[The prepared statement of Senator Bentsen follows:]

Prepared Statement of Senator Bentsen

THANK YOU, MR. CHAIRMAN. I APPLAUD YOU FOR CALLING THESE SPECIAL HEARINGS AND CONGRATULATE YOU ON THE ILLUSTRIOUS WITNESSES WHO WILL FOLLOW OVER THE COURSE OF YOUR HEARINGS.

I APPEAR BECAUSE I AM EAGER TO COMMEND TO THE CHAIRMAN THAT THE JOINT ECONOMIC COMMITTEE GIVE THOUGHT, IN ITS EXAMINATION OF THE POLITICAL ECONOMY, TO AN AMENDMENT THAT HAS BEEN BEFORE THE NATION FOR AT LEAST 150 YEARS.

PRESIDENT ANDREW JACKSON URGED CONGRESS IN ALMOST EVERY MESSAGE HE SENT UP FROM THE WHITE HOUSE TO CHANGE THE CONSTITUTION SO THAT PRESIDENTS COULD SERVE ONLY A SINGLE TERM. PRESIDENT JACKSON WANTED FUTURE PRESIDENTS TO AVOID BEING DRAWN INTO WEIGHING THEIR OWN POLITICAL PROSPECTS AGAINST THE GENERAL GOOD OF THE COUNTRY.

WE TEND TO DISMISS THE POST-SERVICE COUNSELS OF OUR PRESIDENTS AS SELF-SERVING, BUT I FEEL IT IS IMPORTANT TO NOTE THAT MOST OF OUR PRESIDENTS IN THE 19TH CENTURY AND MOST OF OUR PRESIDENTS IN THE CURRENT CENTURY HAVE URGED THIS REFORM -- NOT BECAUSE IT WOULD IN ANY WAY AFFECT THEIR OWN TENURES BUT BECAUSE THEY BELIEVED THAT WISER AND FIRMER LEADERSHIP WOULD INEVITABLY RESULT. IT CERTAINLY IS NOT A PARTISAN PROPOSAL. DWIGHT EISENHOWER WAS FOR IT; SO WERE LYNDON JOHNSON AND JIMMY CARTER AS WELL AS SUCH DIVERSE SENATE LEADERS AS HENRY CLAY, MIKE MANSFIELD, EVERETT DIRKSEN, AND GEORGE AIKEN.

To this Committee, with its special view of how politics impact upon the economy, I submit that an election cycle extended to six years would give us a far better chance for stability. Presidents would have more opportunity to wrestle with basic economic problems and less incentive to attempt to shape economic trends into election year assets. And, so would the Congress. A single-term President would inevitably have a better chance to think objectively, examining proposals more on their merits and less on their potential to do him political good or political harm.

There is an overload factor in government today. All of us who hold office wrestle with it and it becomes particularly difficult for the White House as the reach of the government expands and the demand for political solutions at the national level increases. With no necessity to be diverted by primary campaigns and the many other absorbing aspects of national politics, a single-term President could give more time and attention to the job. He could deal in more candid terms with Congress, the media, and the people. A President talking frankly about the problems would inevitably gain credibility. And this candor would strengthen his capacity for leadership and his ability to stimulate confidence. In complex times, the stimulation of confidence is the most urgent task of political leadership.

Some say that a President elected for a single term would be an immediate lame duck, but that's not a negative point.

The truth is that the American political system works best -- in fact it only works well -- when there is a substantial bond of rapport between the President and the people. So long as this bond exists, the President retains his massive influence. And so long as he has influence there can be no question of his becoming a non-contributing lame duck. That cliche developed in days when Presidential influence depended heavily upon patronage. Modern Presidents gain their leverage from their ability to propound ideas that capture public support and from their projection of a sincere commitment to the Nation's well-being. Just as Dwight Eisenhower showed us, a President who wins the trust of the people will not lose it because he has to leave office at the end of his term.

Some argue that a President elected for a single six-year term will lock himself off in an ivory tower, maintaining a lofty stature of divided powers. A President will still be remembered for what he accomplishes and to get things done he will always have to reach out for the support of public opinion and work closely with Congress. The reform of a single six-year term will rescue the President only from the petty intrigues with pressure groups and the diverting, time-consuming maneuvers that are unavoidably part of any effort to be renominated and reelected. The reform will give every President a far better chance to be, in Woodrow Wilson's words, "As big a man as he can."

BUT WHAT, SOME ASK, IF WE ELECT A MEDIOCRE PRESIDENT? THEY ARGUE WE WILL BE STUCK WITH HIM FOR SIX YEARS INSTEAD OF FOUR. IF HE IS NOT BAD ENOUGH TO BE IMPEACHED, THEY ARE RIGHT. BUT THE GOOD LORD AND THE VOTING PUBLIC HAVE BEEN GOOD TO US OVER THE STRETCH OF NEARLY 200 YEARS, STILL, WE ALL KNOW FROM EXPERIENCE IN OUR LIFETIME THAT THE OVAL OFFICE CAN BE CAPTURED BY PEOPLE WHO LACK SOME IMPORTANT QUALITIES OF LEADERSHIP.

BUT THERE ARE ANSWERS TO THIS CRITICISM. FIRST OF ALL, THE NATIONAL POLITICAL PARTIES ARE RESPONDING TO THEIR STRONG OBLIGATION TO IMPROVE AND REFINE THEIR METHODS OF SELECTING PRESIDENTIAL CANDIDATES. SECOND, A SIX-YEAR INTERLUDE BETWEEN ELECTIONS WILL GIVE THE VOTERS A LONGER CHANCE FOR CLOSE SCRUTINY OF THE CANDIDATES. AND ABLER CITIZENS ARE LIKELY TO BE DRAWN INTO COMPETING FOR THE PRESIDENCY IF THEY KNOW THE WINNER WILL HAVE SIX YEARS TO DEAL WITH THE PROBLEMS AND IF THEY BELIEVE THEY WILL BE JUDGED IN THE OVAL OFFICE BY WHAT THEY ARE ABLE TO DO FOR THE COUNTRY RATHER THAN BY THEIR SUCCESS AT MANIPULATING THE ELECTORATE TO WIN A SECOND TERM.

ELIHU ROOT, ONE OF OUR GREATEST STATESMEN, MADE THIS POINT SUCCINCTLY MANY YEARS AGO. "YOU CANNOT SEPARATE," HE SAID, "THE ATTEMPTS TO BEAT THE PRESIDENT SEEKING REELECTION FROM THE ATTEMPTS TO MAKE INEFFICIENT THE OPERATIONS OF GOVERNMENT."

WHEN WE ANALYZE THE FEW DISTORTIONS OF GOVERNMENT, THE OCCASIONS ON WHICH THE BROAD PUBLIC INTEREST SEEMS TO HAVE BEEN JEOPARDIZED OR IGNORED, INVARIABLY WE FIND THAT RESPONSIBLE OFFICIALS HAD THEIR EYES ON AN UPCOMING ELECTION.

IT DOESN'T HAVE TO BE THAT WAY.

THANK YOU VERY MUCH.

Representative **REUSS**. Thank you, Senator Bentsen, for doing what these hearings want done: putting a very specific proposal on the table and giving the reasons for it, and opening a public discussion that I hope will last at least through 1987—the anniversary of our Constitution.

Because the Founding Fathers—the Jeffersons, the Madisons—all envisaged that while the Constitution, as laid down 195 years ago, was a marvelous document and the best that could be devised, one of the features which gives it strength is that it can be improved if an overwhelming case is made over the years for improving it.

So you put on the table the idea of one 6-year term for the President. In favor of that you have said that that additional 2 years on a 4-year term gives the President a crucially longer time, an extra 2 years, to bring to fruition a coherent program in economics. You believe that in the complicated world in which we live, 6 years is about the minimum that is fair to allow for that.

PRESIDENT LIMITED TO ONE TERM

You also point out the elimination of a second term—you could have a 6-year term and not have it a single term but you do——

Senator **BENTSEN**. Mr. Chairman, if we did that—have two 6-year terms—I think we would have lost the argument, because then we would probably be seeing election year politics again.

I think it takes the 6 years to accomplish the objective and to make changes across the Nation. But I do think we should not have the drain on a man's time, his energies, his talents, at seeking reelection when he has the most responsible and most difficult job in the world today.

Representative **REUSS**. There really are two facets to your proposal. One is a 6-year term to give the man or woman who was President a chance to do what needs to be done with our economic and other major problems. You believe it needs more than 4 years, and 6 you believe would be about a proper minimum.

And, secondly, you say: make it a single term to get rid of another problem, the inevitable politicking which tends to occur in the twilight of the President who intends to run for another term.

Senator **BENTSEN**. That's correct. I think what has happened with fundraising, controlled by a President and allocated out at the President's discretion to candidates of his own party, gives him enormous influence and power to the day he finishes his term.

Representative Reuss. If you restrict a President to a single term of 6 years, you are inevitably going to produce a situation where a lot of Americans, if we have that system, would say, "Well, isn't it too bad President *X* is lost to us. We would have loved to have seen him for 12 years, 18 years." To that you say, "Well, that is a legitimate sadness, but on a balancing of virtues, it's better to call it quits after 6 years."

Obviously, that is your cost-benefit conclusion. Can you spell out in a little greater detail why you make that judgment?

Senator Bentsen. Yes. Again, I think, the President, with the awesome responsibilities that he has, just should not be diverted from a single objective of being the best President he can objectively be without concern for how his office might be an asset or a liability in his reelection or the campaign of those of his party.

I think that modern campaigning—with the commitment of funds and time and the fact that whoever is running against him is going to be out there running for a couple of years—requires a President to spend a substantial amount of energy and time, energy and time which should not be spent for the purpose of reelection or the campaigning for candidates of his party. Further, I think the President would inspire greater confidence on the part of the people if he is not a part of campaigning because the people would think his decisions were more objective and not self-serving if he was not seeking reelection.

Again, there are those who would say, "Well, the President diminishes his power as he gets near the end of his term." My answer to that is I've seen some Presidents who were pretty tough throwing their weight around right up to the end of their term, even though they weren't running for reelection.

For example, Lyndon Johnson, even after November when he was still doing some rather important things, wasn't timid. I just have to get back to this new development in the political equation of this country, and that is the incredible ability of an incumbent President to raise funds, and then to have the authority and responsibility to either deny or to award funds to candidates of one's own party.

I think this power adds immeasurably to the persuasive abilities of the man who doles out the funds. They become very articulate in those kinds of situations.

Representative Reuss. I don't mean in any way to be personal, but I'm going to ask this: You are now completing a 6-year term. You determined to seek another term and you succeeded, and I personally am very happy that you were successful.

My question is this: In the last year of your 6-year term, the first 10 months of 1982 until the last week's election, were you in your judgment as effective and able as a Senator as you were in the first 5 years of your term?

Senator Bentsen. Mr. Chairman, you cannot do both jobs—running for reelection and serving your last term in the Senate—as efficiently as you would like.

This dual responsibility obviously divides your energies and your thoughts, and there's no question but that it is a drain on doing the job as a Senator.

That question and answer, obviously, leads to another: "Well, Senator, if that's your recommendation for a president, why not one six-year term for a Senator?"

The difference is that the President is the most powerful man in the world today. He is a man of tremendous influence and the powers of the presidency give him that.

When you're talking about a Senator, you're talking about 1 of 100. Every 2 years you get a third of them up for reelection. If you're going to have checks and balances, I think you have to have some continuity over on the congressional side. In order to be able to have checks and balances on the Presidency, you have to have some experience on the congressional side.

So I think we have worked out a pretty good balance on that.

WOULD THESE PROPOSALS IMPROVE ECONOMIC POLICY?

Representative REUSS. This committee, I don't have to remind you, is the Joint Economic Committee, and we are looking at political and governmental questions today simply because the big questions of economics—unemployment, inflation, the world economic situation, the distribution of income and wealth—we believe depend upon whether we have a fully effective political system, and that's precisely what you are addressing yourself to.

But let me be quite specific. I think you would agree—certainly you were concerned as chairman of the Joint Economic Committee—that jobs, prices, the international dollar, balance of payments, and the distribution of income and wealth, are the proper stuff of the best efforts not only of the Joint Economic Committee but of the Nation.

How would a 6-year term for the President—had we had it in the last 15 years, or should we have it in the future—make any more soluble these questions which one has to admit we are not solving in any glorious fashion?

We've had in the last few years terrible inflation, we now have terrible unemployment. The world, developed and developing, is in the most powerless condition it's been in many years.

Would any 6-year term presidency make any difference?

Senator BENTSEN. Yes. I think you would have seen some decisions made which were more objective without the political consequence weighing as high.

Representative REUSS. Whenever one puts his mind on the bold question that you're asking yourself, How do we make our Government better? One is immediately struck by the linkage between one possible change and another possible change.

You start and end your prescription with a 6-year single term for the Presidency. I'm certainly not suggesting that that isn't a good place to start and end, but let me put this to you. You are, after all, adding 2 years to the Presidency, that's the point of your proposition.

On the question of what if we elect a "dud" as a President, we would be stuck with him, as you say, for 6 years instead of 4, and if he's not bad enough to be impeached—well, so far we've always muddled through, and indeed without raking up the unpleasant history of 10 years ago, we were lucky that we got through that crisis without total trauma.

My question is, there are those—and they will be heard from during the course of these hearings—who while they don't advocate a complete parliamentary system for this country and would retain the Presidential system, nevertheless see some value in the possibility of a vote of confidence.

Let's make it specific: If you have your 6-year Presidency, taking account of the fact that if you had an unsatisfactory President, who, while stopping short of committing the high crime or misdemeanor necessary for impeachment—whatever that may be—has produced an unsatisfactory situation of deadlock for the Congress and a patent loss of confidence with the public, wouldn't it be a good idea to give the Congress, once in a 6-year Presidential term, the power by an extraordinary vote, say, two-thirds or 60 percent, to express no confidence in the President, which would thereupon require the President, in a short and reasonable time, to declare a national election both for the Presidency and also for the Congress—the latter to prevent the Congress from frivolously, at cost to itself, voting no confidence?

What would you think of such an addendum—and I will admit it's a big addendum to your proposal—designed to combat the 5½ years of mediocrity scenario that you mentioned might ensue? Four years is bad enough, 6 years might be quite gruesome.

Senator BENTSEN. Mr. Chairman, that, like the one I'm propounding, is one that has been discussed many times in the history of our country.

I have tended to get away from anything that smacks of the parliamentary form of government. Your proposal would resemble the parliamentary system to a minor degree. I understand that.

While it is a very subtle proposal, I have leaned against that, frankly because I have thought that a mediocre President may rise above that mediocrity if he knows his term is for 6 years only. If he is as marginal as you suggest, on the other hand, the Congress would not embrace his programs and would enact its own. If he vetoed Congress work, the Congress would repeatedly override his vetoes providing the safeguards we need short of impeachment.

Representative REUSS. Thank you very much. You have made a notable leadoff witness. We're most grateful to you. I am happy that you are back, and look forward to 6 years more of you in office.

Senator BENTSEN. Mr. Chairman, I have enjoyed very much my association with you on this committee and your leadership of it. I only regret that you have chosen to leave this career for another.

Representative REUSS. Thank you very much.

COMMITTEE PROCEEDS TO OTHER PROPOSALS

I will now ask our three other witnesses, all of them sitting here in the room: Messrs. George Reedy, Lloyd Cutler, and John Anderson, to come forward. They have, I understand, acquiesced in my suggestion that it would be even more interesting if we could have them sit together, and since they, by no means, represent the same point of view, I think it will be a good dialog between them. Mr.

Cutler is in the middle, Mr. Anderson on his right, and Mr. Reedy on his left. Gentlemen, thank you all for attending.

Mr. Cutler, do you have a prepared statement this morning?

Mr. CUTLER. I do not.

Representative REUSS. If it's all right with you, I would like to insert in the record, at this point, your very thoughtful article in "Foreign Affairs" magazine, if you will stand by that article.

Mr. CUTLER. I fortunately brought a copy with me, Mr. Chairman. [Laughter.]

Representative REUSS. Without objection, that article will be placed in the record at this point. I don't think it could be improved upon as a statement.

[The article referred to follows:]

FOREIGN AFFAIRS

Fall 1980

Lloyd N. Cutler

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TO FORM A GOVERNMENT

> [On May 10, 1940, Winston Churchill was summoned to Buckingham Palace.] His Majesty received me most graciously and bade me sit down. He looked at me searchingly and quizzically for some moments, and then said: "I suppose you don't know why I have sent for you?" Adopting his mood, I replied: "Sir, I simply couldn't imagine why." He laughed and said: "I want to ask you to form a Government." I said I would certainly do so.
>
> —Winston S. Churchill
> *The Gathering Storm* (1948)

Our society was one of the first to write a Constitution. This reflected the confident conviction of the Enlightenment that explicit written arrangements could be devised to structure a government that would be neither tyrannical nor impotent in its time, and to allow for future amendment as experience and change might require.

We are all children of this faith in a rational written arrangement for governing. Our faith should encourage us to consider changes in our Constitution—for which the framers explicitly allowed—that would assist us in adjusting to the changes in the world in which the Constitution must function. Yet we tend to resist suggestions that amendments to our existing constitutional framework are needed to govern our portion of the interdependent world society we have become, and to cope with the resulting problems that all contemporary governments must resolve.

A particular shortcoming in need of a remedy is the structural

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Lloyd N. Cutler is currently Counsel to the President. From 1962 to 1979 he was a partner in the Washington law firm of Wilmer, Cutler & Pickering, and served also on various public commissions. This article is adapted from the Strasburger Lecture delivered at the University of Texas Law School in April 1980. The views expressed are personal to the author. They were formed in large part before he assumed his present position.

inability of our government to propose, legislate and administer a balanced program for governing. In parliamentary terms, one might say that under the U.S. Constitution it is not now feasible to "form a Government." The separation of powers between the legislative and executive branches, whatever its merits in 1793, has become a structure that almost guarantees stalemate today. As we wonder why we are having such a difficult time making decisions we all know must be made, and projecting our power and leadership, we should reflect on whether this is one big reason.

We elect one presidential candidate over another on the basis of our judgment of the overall program he presents, his ability to carry it out, and his capacity to adapt his program to new developments as they arise. We elected President Carter, whose program included, as one of its most important elements, the successful completion of the SALT II negotiations that his two predecessors had been conducting since 1972. President Carter did complete and sign a SALT II Treaty, in June 1979, which he and his Cabinet regarded as very much in the national security interests of the United States. Notwithstanding recent events, the President and his Cabinet still hold that view—indeed they believe the mounting intensity of our confrontation with the Soviet Union makes it even more important for the two superpowers to adopt and abide by explicit rules as to the size and quality of each side's strategic nuclear arsenal, and as to how each side can verify what the other side is doing.

But because we do not "form a Government," it has not been possible for President Carter to carry out this major part of his program.

Of course the constitutional requirement of Senate advice and consent to treaties presents a special situation. The case for the two-thirds rule was much stronger in 1793, when events abroad rarely affected this isolated continent, and when "entangling foreign alliances" were viewed with a skeptical eye. Whether it should be maintained in an age when most treaties deal with such subjects as taxation and trade is open to question. No parliamentary regime anywhere in the world has a similar provision. But in the American case—at least for major issues like SALT—there is merit to the view that treaties should indeed require the careful bipartisan consultation essential to win a two-thirds majority. This is the principle that Woodrow Wilson fatally neglected in 1919. But it has been carefully observed by recent Presidents, including President Carter for the Panama Canal Treaties and the SALT II Treaty. In each of these cases there was a clear prior record of support by previous Republican Administrations, and there would surely have been enough votes for fairly rapid ratification if the President could have counted on the total or near-total support of his own party—if, in short, he had truly formed a Government, with a legislative majority which takes the responsibility for governing.

Treaties may indeed present special cases, and I do not argue here for any change in the historic two-thirds requirement. But our inability to "form a Government" able to ratify SALT II is replicated regularly over the whole range of legislation required to carry out any President's overall program, foreign and domestic. Although the enactment of legislation takes only a simple majority of both Houses, that majority is very difficult to achieve. Any part of the President's legislative program may be defeated, or amended into an entirely different measure, so that the legislative record of any presidency may bear little resemblance to the overall program the President wanted to carry out. Energy and the budget provide two current and critical examples. Indeed, SALT II itself could have been presented for approval by a simple majority of each House under existing arms control legislation, but the Administration deemed this task even more difficult than achieving a two-thirds vote in the Senate. And this difficulty is of course compounded when the President's party does not even hold the majority of the seats in both Houses, as was the case from 1946 to 1948, from 1954 to 1960 and from 1968 to 1976—or almost half the duration of the last seven Administrations.

The Constitution does not require or even permit in such a case the holding of a new election, in which those who oppose the President can seek office to carry out their own overall program. Indeed, the opponents of each element of the President's overall program usually have a different makeup from one element to another. They would probably be unable to get together on any overall program of their own, or to obtain the congressional votes to carry it out. As a result the stalemate continues, and because we do not form a Government, we have no overall program at all. We cannot fairly hold the President accountable for the success or failure of his overall program, because he lacks the constitutional power to put that program into effect.

Compare this with the structure of parliamentary governments. A parliamentary government may have no written constitution, as in the United Kingdom. Or it may have a written constitution, as in West Germany, Japan and Ireland, that in other respects—such as an independent judiciary and an entrenched Bill of

Rights—closely resembles our own. But while there may be a ceremonial President or, as in Japan, an Emperor, the executive consists of those members of the legislature chosen by the elected legislative majority. The majority elects a Premier or Prime Minister from among its number, and he selects other leading members of the majority as the members of his Cabinet. The majority as a whole is responsible for forming and conducting the "government." If any key part of its overall program is rejected by the legislature, or if a vote of "no confidence" is carried, the "Government" must resign and either a new "Government" must be formed out of the existing legislature or a new legislative election must be held. If the program *is* legislated, the public can judge the results, and can decide at the next regular election whether to reelect the majority or turn it out. At all times the voting public knows who is in charge, and whom to hold accountable for success or failure.

Operating under a parliamentary system, Chancellor Helmut Schmidt formed the present West German Government with a majority of only four, but he has succeeded in carrying out his overall program these past five years. Last year Mrs. Thatcher won a majority of some 30 to 40 in the British Parliament. She has a very radical program, one that can make fundamental changes in the economy, social fabric and foreign policy of the United Kingdom. There is room for legitimate doubt as to whether her overall program will achieve its objectives and, even if it does, whether it will prove popular enough to reelect her Government at the next election. But there is not the slightest doubt that she will be able to legislate her entire program, including any modifications she makes to meet new problems. In a parliamentary system, it is the duty of each majority member of the legislature to vote for each element of the Government's program, and the Government possesses the means to punish members if they do not. In a very real sense, each member's political and electoral future is tied to the fate of the Government his majority has formed. Politically speaking, he lives or dies by whether that Government lives or dies.

President Carter's party has a much larger majority percentage in both Houses of Congress than Chancellor Schmidt or Mrs. Thatcher. But this comfortable majority does not even begin to assure that President Carter or any other President can rely on that majority to vote for each element of his program. No member of that majority has the constitutional duty or the practical political need to vote for each element of the President's program.

Neither the President nor the leaders of the legislative majority have the means to punish him if he does not. In the famous phrase of Joe Jacobs, the fight manager, "it's every man for theirself."

Let me cite one example. In the British House of Commons, just as in our own House, some of the majority leaders are called the Whips. In the Commons, the Whips do just what their title implies. If the Government cares about the pending vote, they "whip" the fellow members of the majority into compliance, under pain of party discipline if a member disobeys. On the most important votes, the leaders invoke what is called a three-line whip, which must be obeyed on pain of resignation or expulsion from the party.

In our House, the Majority Whip, who happens to be one of our very best Democratic legislators, can himself feel free to leave his Democratic President and the rest of the House Democratic leadership on a crucial vote, if he believes it important to his constituency and his conscience to vote the other way. When he does so, he is not expected or required to resign his leadership post; indeed he is back a few hours later "whipping" his fellow members of the majority to vote with the President and the leadership on some other issue. But all other members are equally free to vote against the President and the leadership when they feel it important to do so. The President and the leaders have a few sticks and carrots they can use to punish or reward, but nothing even approaching the power that Mrs. Thatcher's Government or Chancellor Schmidt's Government can wield against any errant member of the majority.

I am hardly the first to notice this fault. As Judge Carl McGowan has reminded us, that "young and rising academic star in the field of political science, Woodrow Wilson—happily unaware of what the future held for him in terms of successive domination of, and defeat by, the Congress—despaired in the late 19th century of the weakness of the Executive Branch vis-à-vis the Legislative, so much so that he concluded that a coalescence of the two in the style of English parliamentary government was the only hope."[1]

As Wilson put it, "power and strict accountability for its use are the essential constituents of good Government."[2] Our separation of executive and legislative power fractions power and prevents accountability.

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[1] Carl McGowan, "Congress, Court, and Control of Delegated Power," *Columbia Law Review*, Vol. 77, No. 8 (1977) pp. 1119-20.

[2] *Congressional Government: A Study in American Politics*, Boston and New York: Houghton Mifflin, 1913, p. 284.

In drawing this comparison, I am not blind to the proven weaknesses of parliamentary government, or to the virtues which our forefathers saw in separating the executive from the legislature. In particular, the parliamentary system lacks the ability of a separate and vigilant legislature to investigate and curb the abuse of power by an arbitrary or corrupt executive. Our own recent history has underscored this virtue of separating these two branches.

Moreover, our division of executive from legislative responsibility also means that a great many more voters are represented in positions of power, rather than as mere members of a "loyal opposition." If I am a Democrat in a Republican district, my vote in the presidential election may still give me a proportional impact. And if my party elects a President, I do not feel—as almost half the voters in a parliamentary constituency like Oxford must feel—wholly unrepresented. One result of this division is a sort of a permanent centrism. While this means that no extreme or Thatcher-like program can be legislated, it means also that there are fewer wild swings in statutory policy.

This is also a virtue of the constitutional division of responsibility. It is perhaps what John Adams had in mind when, at the end of his life, he wrote to his old friend and adversary, Thomas Jefferson, that "checks and ballances, Jefferson, . . . are our only Security, for the progress of Mind, as well as the Security of Body."[3]

But these virtues of separation are not without their costs. I believe these costs have been mounting in the last half-century, and that it is time to examine whether we can reduce the costs of separation without losing its virtues.

During this century, other nations have adopted written constitutions, sometimes with our help, that blend the virtues of our system with those of the parliamentary system. The Irish Constitution contains a replica of our Bill of Rights, an independent Supreme Court that can declare acts of the government unconstitutional, a figurehead president, and a parliamentary system. The postwar German and Japanese Constitutions, which we helped to draft, are essentially the same. While the Gaullist French Constitution contains a Bill of Rights somewhat weaker than ours, it provides for a strong President who can dismiss the legislature and call for new elections. But it also retains the parliamentary system and its blend of executive and legislative power achieved by forming a Government out of the elected legislative majority. The President, however, appoints the Premier or First Minister.

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[3] *The Adams-Jefferson Letters*, Vol. II, (Lester J. Cappon, ed.), Chapel Hill: University of North Carolina Press, 1959, p. 134.

II

We are not about to revise our own Constitution so as to incorporate a true parliamentary system. But we do need to find a way of coming closer to the parliamentary concept of "forming a Government," under which the elected majority is able to carry out an overall program, and is held accountable for its success or failure.

There are several reasons why it is far more important in 1980 than it was in 1940, 1900 or 1800 for our government to have the capability to formulate and carry out an overall program.

1) The first reason is that government is now constantly required to make a different kind of choice than usually in the past, a kind for which it is difficult to obtain a broad consensus. That kind of choice, which one may call "allocative," has become the fundamental challenge to government today. As a recent newspaper article put it:

> The domestic programs of the last two decades are no longer seen as broad campaigns to curb pollution or end poverty or improve health care. As these programs have filtered down through an expanding network of regulation, they single out winners and losers. The losers may be workers who blame a lost promotion on equal employment programs; a chemical plant fighting a tough pollution control order; a contractor who bids unsuccessfully for a government contract, or a gas station owner who wants a larger fuel allotment.[4]

This is a way of recognizing that, in giving government great responsibilities, we have forced a series of choices among these responsibilities.

During the second half of this century, our government has adopted a wide variety of national goals. Many of these goals—checking inflation, spurring economic growth, reducing unemployment, protecting our national security, assuring equal opportunity, increasing social security, cleaning up the environment, improving energy efficiency—conflict with one another, and all of them compete for the same resources. There may have been a time when we could simultaneously pursue all of these goals to the utmost. But even in a country as rich as this one, that time is now past. One of the central tasks of modern government is to make wise balancing choices among courses of action that pursue one or more of our many conflicting and competing objectives.

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[4] Quoted from Carl P. Leubsdorf, "Contemporary Problems Leave U.S. Political System Straining to Cope," reprinted in the *Congressional Record*, October 31, 1979, pp. S15593-94.

Furthermore, as new economic or social problems are recognized, a responsible government must *adjust* these priorities. In the case of energy policy, the need to accept realistic oil prices has had to be balanced against the immediate impact of drastic price increases on consumers and affected industries, and on the overall rate of inflation. And to cope with the energy crisis, earlier objectives of policy have had to be accommodated along the way. Reconciling one goal with another is a continuous process. A critical regulatory goal of 1965 (auto safety) had to be reconciled with an equally critical regulatory goal of 1970 (clean air) long before the auto safety goal had been achieved, just as both these critical goals had to be reconciled with 1975's key goal (closing the energy gap) long before either auto safety or clean air had lost their importance. Reconciliation was needed because many auto safety regulations had the effect of increasing vehicle size and weight and therefore increasing gasoline consumption and undesirable emissions, and also because auto emission control devices tend to increase gasoline consumption. Moreover, throughout this 15-year period, we have had to reconcile all three of these goals with another critical national objective—wage and price stability—when in pursuit of these other goals we make vehicles more costly to purchase and operate.

And now, in 1980, we find our auto industry at a serious competitive disadvantage vis-à-vis Japanese and European imports, making it necessary to limit those regulatory burdens which aggravate the extent of the disadvantage. A responsible government must be able to adapt its programs to achieve the best balance among its conflicting goals as each new development arises.

For balancing choices like these, a kind of political triage, it is almost impossible to achieve a broad consensus. Every group will be against some part of the balance. If the "losers" on each item are given a veto on that part of the balance, a sensible balance cannot be struck.

2) The second reason is that we live in an increasingly interdependent world. What happens in distant places is now just as consequential for our security and our economy as what happens in Seattle or Miami. No one today would use the term "Afghanistanism," as the Opposition benches did in the British Parliament a century ago, to deride the Government's preoccupation with a war in that distant land. No one would say today, as President

Wilson said in 1914, that general European war could not affect us and is no concern of ours. We are now an integral part of a closely interconnected world economic and political system. We have to respond as quickly and decisively to what happens abroad as to what happens within the portion of this world system that is governed under our Constitution.

New problems requiring new adjustments come up even more frequently over the foreign horizon than the domestic one. Consider the rapid succession of events and crises since President Carter took up the relay baton for his leg of the SALT II negotiations back in 1977: the signing of the Egyptian-Israeli Peace Treaty over Soviet and Arab opposition, the Soviet-Cuban assistance to guerrilla forces in Africa and the Arabian peninsula, the recognition of the People's Republic of China, the final agreement on the SALT II terms and the signing of the Treaty in Vienna, the revolution in Iran and the later seizure of our hostages, the military coup in Korea, the Soviet-supported Vietnamese invasion of Kampuchea, our growing dependence on foreign oil from politically undependable sources, the affair of the Soviet brigade in Cuba, the polarization of rightist and leftist elements in Central America, and finally (that is, until the next crisis a month or two from now) the Soviet invasion of Afghanistan and the added threat it poses to the states of Southwest Asia and to the vital oil supplies of Europe, Japan and the United States.

Each of these portentous events required a prompt reaction and response from our Government, including in many cases a decision as to how it would affect our position on the SALT II Treaty. The government has to be able to adapt its overall program to deal with each such event as it arises, and it has to be able to execute the adapted program with reasonable dispatch. Many of these adaptations—such as changes in the levels and direction of military and economic assistance—require joint action by the President and the Congress, something that is far from automatic under our system. And when Congress does act, it is prone to impose statutory conditions or prohibitions that fetter the President's policy discretion to negotiate an appropriate assistance package or to adapt it to fit even later developments. The congressional bans on military assistance to Turkey, any form of assistance to the contending forces in Angola, and any aid to Argentina if it did not meet our human rights criteria by a deadline now past, are typical examples.

Indeed, the doubt that Congress will approve a presidential foreign policy initiative has seriously compromised our ability to make binding agreements with nations that "form a Government." Given the fate of SALT II and lesser treaties, and the frequent Congressional vetoes of other foreign policy actions, other nations now realize that our executive branch commitments are not as binding as theirs, that Congress may block any agreement at all, and that at the very least they must hold something back for a subsequent round of bargaining with the Congress.

3) The third reason is the change in Congress and its relationship to the Executive. When the Federalist and Democratic Republican parties held power, a Hamilton or a Gallatin would serve in the Cabinet, but they continued to lead rather than report to their party colleagues in the Houses of Congress. Even when the locus of congressional leadership shifted from the Cabinet to the leaders of Congress itself, in the early nineteenth century, it was a congressional leadership capable of collaboration with the Executive. This was true until very recently. The Johnson-Rayburn collaboration with Eisenhower a generation ago is an instructive example. But now Congress itself has changed.

There have been the well-intended democratic reforms of Congress, and the enormous growth of the professional legislative staff. The former ability of the President to sit down with ten or fifteen leaders in each House, and to agree on a program which those leaders could carry through Congress, has virtually disappeared. The committee chairmen and the leaders no longer have the instruments of power that once enabled them to lead. A Lyndon Johnson would have a much harder time getting his way as Majority Leader today than when he did hold and pull these strings of power in the 1950s. When Senator Mansfield became Majority Leader in 1961, he changed the practice of awarding committee chairmanships on the basis of seniority. He declared that all Senators are created equal. He gave every Democratic Senator a major committee assignment and then a subcommittee chairmanship, adding to the sharing of power by reducing the leadership's control.

In the House the seniority system was scrapped. Now the House Majority Caucus—not the leadership—picks the committee chairmen and the subcommittee chairmen as well. The House Parliamentarian has lost the critical power to refer bills to a single committee selected by the Speaker. Now bills like the energy bills go to several committees which then report conflicting versions back to the floor. Now mark-up sessions take place in public; indeed, even the House-Senate joint conference committees, at which differing versions of the same measure are reconciled, must meet and barter in public.

The recent conference committees on the Synthetic Fuels Corporation and the Energy Mobilization Board, for example, were so big and their procedures so cumbersome that they took six months to reach agreement, and then the agreement on the Board was rejected by the House. All this means that there are no longer a few leaders with power who *can* collaborate with the President. Power is further diffused by the growth of legislative staffs, sometimes making it difficult for the members even to collaborate with each other. In the past five years, the Senate alone has hired 700 additional staff members, an average of seven per member.

There is also the decline of party discipline and the decline of the political party itself. Presidential candidates are no longer selected, as Adlai Stevenson was selected, by the leaders or bosses of their party. Who are the party leaders today? There are no such people. The party is no longer the instrument that selects the candidate. Indeed, the party today, as a practical matter, is no more than a neutral open forum that holds the primary or caucus in which candidates for President and for Congress may compete for favor and be elected. The party does not dispense most of the money needed for campaigning, the way the European and Japanese parties do. The candidates raise most of their own money. To the extent that money influences legislative votes, it comes not from a party with a balanced program, but from a variety of single-interest groups.

We now have a great many diverse and highly organized interest groups—not just broad-based agriculture, labor, business and ethnic groups interested in a wide variety of issues affecting their members. We now have single-issue groups—environmental, consumer, abortion, right to life, pro- and anti-SALT, pro- and anti-nuclear, that stand ready to lobby for their single issue and to reward or punish legislators, both in cash and at the ballot box, according to how they respond on the single issue that is the group's raison d'être. And on many specific foreign policy issues involving particular countries, there are exceptionally strong voting blocs in this wonderful melting pot of a nation that exert a great deal of influence on individual Senators and Congressmen.

III

It is useful to compare this modern failure of our governmental structure with its earlier classic successes. There can be no structural fault, it might be said, so long as an FDR could put through an entire anti-depression program in 100 days, or an LBJ could enact a broad program for social justice three decades later. These infrequent exceptions, however, confirm the general rule of stalemate.

If we look closely we will find that in this century the system has succeeded only on the rare occasions when there is an unusual event that brings us together, and creates substantial consensus throughout the country on the need for a whole new program. FDR had such a consensus in the early days of the New Deal, and from Pearl Harbor to the end of World War II. But we tend to forget that in 1937 his court-packing plan was justifiably rejected by Congress—a good point for those who favor complete separation of the executive from the legislature[5]—and that as late as August 1941, when President Roosevelt called on Congress to pass a renewal of the Selective Service Act, passage was gained by a single vote in the House. Lyndon Johnson had such a consensus for both his domestic and his Vietnam initiatives during the first three years after the shock of John Kennedy's assassination brought us together. But it was gone by 1968. Jimmy Carter has had it this past winter and spring for his responses to the events in Iran and Afghanistan and to the belated realization of our need for greater energy self-sufficiency, but he may not hold it for long. Yet the consensus on Afghanistan was marred by the long congressional delay in appropriating the small amounts needed to register 19- and 20-year-olds under the Selective Service Act—a delay that at least blurred the intended impact of this signal to the world of our determination to oppose further Soviet aggression.[6]

When the great crisis and the resulting large consensus are not there—when the country is divided somewhere between 55–45 and 45–55 on each of a wide set of issues, and when the makeup of the majority is different on every issue—it has not been possible for any modern President to "form a Government" that could legislate and carry out his overall program.

Yet modern government has to respond promptly to a wide range of new challenges. Its responses cannot be limited to those for which there is a large consensus induced by some great crisis. Modern government also has to work in every presidency, not just

[5] The mention of this historic example may strike some readers as sharply impairing the general thesis of this article in favor of disciplined party voting in the Congress. But one can readily envisage a category of issues—analogous to mutual defense treaties—where an Administration would not be entitled to apply party discipline. (In Britain, for example, votes on such issues as capital punishment have traditionally not been subject to the party whip.) Any measure amending the Constitution or affecting the separation of powers (as the 1937 Court Plan did) should probably be exempted, as well as any issue of religious conscience, such as legislation bearing on abortion.

[6] Similarly, the belated consensus on energy self-sufficiency did not restrain the Congress from overriding, by one of the largest margins in history, the President's unpopular but necessary oil import fee order.

in one presidency out of four, when a Wilson, an FDR or an LBJ comes along. It also has to work for the President's full time in office, as it did not even for Wilson and LBJ. When they needed congressional support for the most important issue of their presidencies, they could not get it.

When the President gets only "half a loaf" of his overall program, this half a loaf is not necessarily better than none, because it may lack the essential quality of balance. And half a loaf leaves both the President and the public in the worst of all possible worlds. The public—and the press—still expect the President to govern. But the President cannot achieve his overall program, and the public cannot fairly blame the President because he does not have the power to legislate and execute his program. Nor can the public fairly blame the individual members of Congress, because the Constitution allows them to disclaim any responsibility for forming a Government and hence any accountability for its failures.

Of course the presidency always has been and will continue to be what Theodore Roosevelt called "a bully pulpit"—not a place from which to "bully" in the sense of intimidating the Congress and the public, but in the idiom of TR's day a marvelous place from which to exhort and lift up Congress and the public. All Presidents have used the bully pulpit in this way, and this is one reason why the American people continue to revere the office and almost always revere its incumbent. Television has probably amplified the power of the bully pulpit, but it has also shortened the time span of power; few television performers can hold their audiences for four consecutive years. In any event, a bully pulpit, while a glorious thing to have and to employ, is not a Government, and it has not been enough to enable any postwar President to "form a Government" for his entire term.

Finally, the myth persists that the existing system can be made to work satisfactorily if only the President will take the trouble to consult closely with the Congress. If one looks back at the period between 1947 and 1965 there were indeed remarkable cases, at least in the field of foreign policy, where such consultation worked to great effect, even across party lines. The relationships between Senator Vandenberg and Secretaries Marshall and Acheson, and between Senator George and Secretary Dulles, come readily to mind. But these examples were in an era of strong leadership within the Congress, and of unusual national consensus on the overall objectives of foreign policy and the measures needed to carry it out.

Even when these elements have not been present, every President has indeed tried to work with the majority in Congress, and the majority in every Congress has tried to work with the President. Within this past year, when there has been a large consensus in response to the crises in Afghanistan and Iran, a notable achievement has been a daily private briefing of congressional leaders by the Secretary of State, and weekly private briefings with all Senate and House members who want to attend—a step that has helped to keep that consensus in being. Another achievement of recent times is the development of the congressional budget process, exemplified by the cooperation between the congressional leadership and the President in framing the 1981 budget.

But even on Iran, Afghanistan and the budget, the jury is still out on how long the large consensus will hold. And except on the rare issues where there is such a consensus, the structural problems usually prove too difficult to overcome. In each Administration, it becomes progressively more difficult to make the present system work effectively on the range of issues, both domestic and foreign, that the United States must now manage even though there is no large consensus.

IV

If we decide we want the capability of forming a Government, the only way to do so is to amend the Constitution. Amending the Constitution, of course, is extremely difficult. Since 1793, when the Bill of Rights was added, we have amended the Constitution only 16 times. Some of these amendments were structural, such as the direct election of Senators, votes for women and 18 years olds, the two-term limit for Presidents, and the selection of a successor Vice President. But none has touched the basic separation of executive and legislative powers.

The most one can hope for is a set of modest changes that would make our structure work somewhat more in the manner of a parliamentary system, with somewhat less separation between the executive and the legislature than now exists.

There are several candidate proposals. Here are some of the more interesting ideas:

1) We now vote for a presidential candidate and a vice-presidential candidate as an inseparable team. We could provide that in presidential election years, voters in each congressional district would be required to vote for a trio of candidates, as a team, for President, Vice President and the House of Representatives. This

would tie the political fortunes of the party's presidential and congressional candidates to one another, and provide some incentive for sticking together after they are elected. Such a proposal could be combined with a four-year term for members of the House of Representatives. This would tie the presidential and congressional candidates even more closely, and has the added virtue of providing members with greater protection against the pressures of single-issue political groups. This combination is the brainchild of Congressman Jonathan Bingham of New York, and is now pending before the Congress.

In our bicameral legislature, the logic of the Bingham proposal would suggest that the inseparable trio of candidates for President, Vice President and Member of Congress be expanded to a quintet including the two Senators, who would also have the same four-year term. But no one has challenged the gods of the Olympian Senate by advancing such a proposal.

2) Another idea is to permit or require the President to select 50 percent of his Cabinet from among the members of his party in the Senate and House, who would retain their seats while serving in the Cabinet. This would be only a minor infringement on the constitutional principle of separation of powers, but it would require a change in Article I, Section 6, which provides that "no person holding any office under the United States shall be a member of either house during his continuance in office." It would tend to increase the intimacy between the executive and the legislature, and add to their sense of collective responsibility. The 50-percent test would leave the President adequate room to bring other qualified persons into his Cabinet, even though they do not hold elective office.

3) A third intriguing suggestion is to provide the President with the power, to be exercised not more than once in his term, to dissolve Congress and call for new congressional elections. This is the power now vested in the President under the French Constitution. It would provide the opportunity that does not now exist to break an executive-legislative impasse, and to let the public decide whether it wishes to elect Senators and Congressmen who *will* legislate the President's overall program.

For obvious reasons, the President would invoke such a power only as a last resort, but his potential ability to do so could have a powerful influence on congressional responses to his initiatives. This would of course be a radical and highly controversial proposal, and it involves a number of technical difficulties relating to the timing and conduct of the new election, the staggering of senatorial terms and similar matters. But it would significantly enhance the President's power to form a Government.

On the other hand, the experience of Presidents—one recalls Nixon in 1970—who sought to use the mid-term election as a referendum on their programs suggests that any such dissolution and new election would be equally as likely to continue the impasse as to break it. Perhaps any exercise of the power to dissolve Congress should automatically require a new presidential election as well. But even then, the American public might be perverse enough to reelect all the incumbents to office.

4) Another variant on the same idea is that in addition to empowering the President to call for new congressional elections, we might empower a majority or two-thirds of both Houses to call for new presidential elections. This variant has been scathingly attacked in a series of conversations between Professor Charles Black of the Yale Law School and Congressman Bob Eckhardt of Texas, published in 1975, because they think that such a measure would vitally diminish the President's capacity to lead.[7]

5) There are other proposals that deserve consideration. There could be a single six-year presidential term, an idea with many supporters, among them Presidents Eisenhower, Johnson and Carter, to say nothing of a great many political scientists. (The French Constitution provides a seven-year term for the President, but permits reelection.) Of course Presidents would like to be elected and then forget about politics and get to the high ground of saving the world. But if first-term Presidents did not have the leverage of reelection, we might institutionalize for every presidency the lame duck impotence we now see when a President is not running for reelection.

6) It may be that one combination involving elements of the third, fourth and fifth proposals would be worthy of further study. It would be roughly as follows:

A. The President, Vice President, Senators and Congressmen would all be elected for simultaneous six-year terms.

B. On one occasion each term, the President could dissolve Congress and call for new congressional elections for the remainder of the term. If he did so, Congress, by majority vote of both Houses within 30 days of the President's action, could call for simultaneous new elections for President and Vice President for the remainder of the term.

C. All state primaries and state conventions for any required mid-term elections would be held 60 days after the first call for new elections. Any required national presidential nominating conventions would be held 30 days later. The national elections would be held 60 days after the state primary elections and state conventions. The entire cycle would take 120 days. The dissolved Congress would be free to remain in session for part or all of this period.

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[7] Bob Eckhardt and Charles L. Black, Jr., *The Tides of Power: Conversations on the American Constitution*, New Haven: Yale University Press, 1976.

D. Presidents would be allowed to serve only one full six-year term. If a mid-term presidential election is called, the incumbent would be eligible to run and, if reelected, to serve the balance of his six-year term.

Limiting each President to one six-year term would enhance the objectivity and public acceptance of the measures he urges in the national interest. He would not be regarded as a lame duck because of his continuing power to dissolve Congress. Our capacity to "form a Government" would be enhanced if the President could break an impasse by calling for a new congressional election and by the power of Congress to respond by calling for a new presidential election.

Six-year terms for Senators and Congressmen would diminish the power of single-interest groups to veto balanced programs for governing. Because any mid-term elections would have to be held promptly, a single national primary, a shorter campaign cycle and public financing of congressional campaigns—three reforms with independent virtues of their own—would become a necessity for the mid-term election. Once tried in a mid-term election, they might well be adopted for regular elections as well.

7) One final proposal may be mentioned. It would be possible, through constitutional amendment, to revise the legislative process in the following way. Congress would enact broad mandates first, declaring general policies and directions, leaving the precise allocative choices, within a congressionally approved budget, to the President. All agencies would be responsible to the President. By dividing up tasks among them, and making the difficult choices of fulfilling some congressional directions at the expense of others, the President would fill in the exact choices, the allocative decisions. Then any presidential action would be returned to Congress where it would await a two-house legislative veto. If not so vetoed within a specified period, the action would become law.

If the legislative veto could be overturned by a presidential veto—subject in turn to a two-thirds override—then this proposal would go a long way to enhance the President's ability to "form a Government." In any event, it should enable the elected President to carry out the program he ran on, subject to congressional oversight, and end the stalemate over whether to legislate the President's program in the first instance. It would let Congress and the President each do what they have shown they now do best.

Such a resequencing, of course, would turn the present process on its head. But it would bring much closer to reality the persisting myth that it is up to the President to govern—something he now lacks the constitutional power to do.

V

How can these proposals be evaluated? How can better proposals be devised? Above all, how can the public be educated to understand the costs of the present separation between our executive and legislative branches, to weigh these costs against the benefits, and to decide whether a change is needed?

One obvious possibility is the widely feared constitutional convention—something for which the Constitution itself provides—to be called by Congress itself or two-thirds of the states. Jefferson expected one to occur every generation. Conventions are commonplace to revise state constitutions. But Congress has never even legislated the applicable rules for electing and conducting a national constitutional convention, even though more than 30 states have now called for one to adopt an amendment limiting federal taxes and expenditures. Because of the concern generated by this proposal, any idea of a national constitutional convention on the separation of powers is probably a non-starter.

A more practicable first step would be the appointment of a bipartisan presidential commission—perhaps an offshoot of President Carter's first-class Commission on the Eighties—to analyze the issues, compare how other constitutions work, hold public hearings, and make a full report. The presidential commission could include ranking members of the House and Senate, or perhaps Congress could establish a parallel joint commission of its own.

The point of this article is not to persuade the reader of the virtue of any particular amendment. I am far from persuaded myself. But I am convinced of these propositions:

We need to do better than we have in "forming a Government" for this country, and this need is becoming more acute.

The structure of our Constitution prevents us from doing significantly better.

It is time to start thinking and debating about whether and how to correct this structural fault.

Representative Reuss. Would you now proceed, Mr. Cutler, followed by Mr. Anderson and then Mr. Reedy.

STATEMENT OF LLOYD N. CUTLER, SENIOR PARTNER, WILMER, CUTLER & PICKERING, WASHINGTON, D.C.

EFFECT OF GOVERNMENT STRUCTURE ON ECONOMIC POLICY

Mr. Cutler. Thank you very much, Mr. Chairman. In your letter inviting us to appear before you today, you stated what I think is the critical problem of the age, and that is, now that we have come to rely on governments around the world to set at least the main outlines of what we call macro-economic policy, in order to achieve steady economic growth, the very purpose of this committee among other agencies in the Government, we acknowledge today that we have failed to do a very good job of managing the economy from the Government's point of view.

When we fail, we tend to blame the man, the President of the United States more than the sytem, and that is the question you posed. Should we be blaming the man or the system? That was the same question I tried to pose in the article you referred to a moment ago.

And about the same time, Douglas Dillon [1] wrote a very thoughtful piece on the same subject, as did your colleague, Senator Claiborne Pell; and I would like to submit Senator Pell's article for the record at this point.

Representative Reuss. Without objection, it will be received.

[Senator Pell's article from the Congressional Record follows:]

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[1] The article by Mr. Dillon may be found beginning on p. 180.

CONSTITUTIONAL AND INSTITUTIONAL REFORM ACT (S.3250)

Statement by

Senator CLAIBORNE PELL

(excerpted from the Congressional Record)
Dec. 5, 1980 - S15743

I am introducing this proposal because of a growing concern that our Government is not responding as effectively as it should to the serious problems and challenges that confront our Nation and the American people in a rapidly changing world.

Increasingly, our Government's best efforts to deal effectively with such problems as inflation, energy supply, productivity, or arms control, to cite a few important examples, end in a stalemate among conflicting views and divided interests.

The result, all too often, is inaction, policies warped or diluted beyond recognition, and ultimately, frustration, stagnation, and a diminished public respect for government itself.

In my view, the sluggish response of our Government to the major challenges facing our Nation is not a judgment of the ability of any President or of the Congress and its leaders or of the Supreme Court. Nor is it a question of political party. It is instead a judgment of how well this Government as an institution responds to clearly identifiable, major problems as they arise.

Regrettably, the tendency toward frustration and stalemate in Government has held true whether the President and the Congress have been controlled by the same or by different political parties.

Indeed, I believe that President-elect Reagan, even with the momentum of his impressive election victory and with a Senate majority of his political party, will experience a good deal of frustration in his efforts to govern effectively - - to successfully formulate, enact, and execute cohesive national policies. . . . .

The serious problem of governing effectively under our system of checks and balances, with society increasingly fragmented into narrow economic, social, and regional interest groups, is not a partisan one.

It is a problem that I believe deserves, and indeed, demands serious nonpartisan study and consideration. . . . .

We all recognize that in framing our Government the Founding Fathers were acutely aware of the dangers of the abuse of centralized power and for that reason built into the Constitution a system of checks and balances between the executive, legislative, and judicial branches and between the Federal and State governments to prevent that abuse.

Without doubt these checks and balances have served our Nation and the American people very well indeed for nearly two centuries with little significant change in the basic structure of our Government.

Indeed, in the entire history of the art of government, the Constitution of the United States is and remains one of the most marvelous works of man, emulated and admired through much of the world.

This should not, however, deter us from examining with a critical eye the effectiveness of our Government. We should not ignore the fact that our Nation and the surrounding world have changed immensely in this century and indeed in just the past 20 years I have served in the Senate. These changes, both economic and technological, have increased manyfold the costs and dangers of ineffective government.

We live now in a world of instantaneous worldwide communication of both words and images. It is a world in which extraordinarily powerful weapons of mass destruction can be hurled half-way around the world in minutes.

It is a world in which the poverty of Haiti, the religious fervor of Shiite Muslims in Iran, drought in the granaries of the Soviet Union, or the actions of a single mad terrorist anywhere in the world can have immediate and serious consequences for the people of the United States.

In such a world, I submit, the margins for error and the tolerance for ineffective government both are considerably narrowed.

But just as a rapidly changing world demands more effective government, other forces have conspired to lessen the ability of our Government to act effectively.

We have experienced in the United States an erosian of the cohesive social and political forces that once were effective in forming majorities that could actually govern.

For most of our constitutional history, our national political parties have been the institutions that bridged the constitutional checks and balances and the separation of powers to make effective government possible.

Today, however, the cohesive powers of political parties and of congressional leadership have been diluted and seriously undermined by combinations of well-intended reforms and the force of new technology that has freed individual officeholders from dependence on their party for nomination, support, election, or reelection.

At the same time, new communication technology also has fragmented as never before the American people into ever narrower interest groups organized to press and pursue their individual interests.

As a result of all these changes, we have Government less able to formulate, enact, and execute policies that are cohesive and in the broad public interest, and on the other hand, an enhanced ability for any significant interest group to prevent any action it finds objectionable.

As one observer has commented, we no longer have rule by the majority or even rule by 75 percent. Today, it requires almost unanimous public consent for our Government to act, and unfortunately, when so many groups have a veto, no one has an effective government.

I believe it is time that we give serious study to the need to strengthen the cohesive forces in our society and Government. I believe it is time to consider how we can again make it possible for political parties to present to the people broad and cohesive policy proposals with some real expectation that a party, once elected to power, can in fact enact and implement the proposals it has offered.

I recognize that in the wake of the recent elections there are those who believe that President-elect Reagan with the force of his electoral margin of victory and his leadership ability can in fact enact and execute the policies he has proposed. Only time will tell, but on the basis of the trends of recent decades, I believe this new administration will experience many of the same frustrations that previous administrations, Republican and Democratic, have experienced. And if that is the case, we will see also a rising frustration and dissatisfaction among the American people.

This is not a partisan proposal, and I hope that members of the Senate, on both sides of the aisle, who I know are concerned at the fragmentation of both the Congress and the American public, will join in supporting this proposal for a study of ways in which we might be able to improve the effectiveness of our Federal Government in responding to national needs.

* * *

Mr. **Cutler.** I had an opportunity in 1981 to appear and present a paper before the Thomas Jefferson Rotunda and to discuss with a group of political scientists and historians at the university, the same question. And at the end of that session, in accordance with the custom of the group, Prof. Dumas Malone, the famous biographer of Thomas Jefferson, was asked to pronounce what he called the benediction. And if I could, Mr. Chairman, I would just like to read two paragraphs. He said this:

> I couldn't agree with Mr. Cutler more about this problem. It could be illustrated from American history all the way through, the idea of division of power was based on fear. The founders of our Government were mostly concerned with avoiding tyranny. They were not much concerned with efficiency. They gave very little thought to that. They didn't expect the Federal Government to do much. They were trying to make it impossible for anyone to be tyrannical by balancing these things. And of course, in the process, they made it impossible to hold anyone accountable.
>
> Now this was almost a dogma. I think you could call it a dogma. I wish I could think of some solution to this problem. There is not any doubt about it being a very serious problem, and I think it goes back to the structure of our Government itself. Mr. Jefferson had an antidote, that there should be a periodic review of constitutions. I think 20 years, which was Mr. Jefferson's suggestion, is a little too often. Madison pointed out that they had to have continuity. It's very much better for changes to occur through the process of evolutionary change than revolutionary measures. But it seems to me that the American Government is in terrible need of reformation, and I suppose you have no hope of ever having a constitutional convention. I would face one with trepidation. But at any rate when you consider the changes in society since 1787, the remarkable thing is our constitution has worked as well as it has.

And here is the key point.

> I can't imagine anyone setting out now to build a government and deliberately dividing it, so that nobody could be held directly responsible for what happened.

And it seems to me that is the key problem, Mr. Chairman, that we have a government in which the sum of all of our policies is—you referred earlier to a coherent set of policies—the sum of all of our different policies is an incoherent or unbalanced set of policies that no one supports and for which no one is prepared to accept accountability.

In the words of that old fight manager, Joe Jacobs, in one if his wonderful malapropisms, "It's every man for theirself." And I think that illustrates our problem very well.

If we were to take the three main functions of government today as assuring national security and world peace, managing economic growth, and providing social justice, there is a very real question whether our present structure, the division of power between the President and the Congress and the subdivisions within the Congress between the House and the Senate, can deal with the first two of those problems: managing world peace and managing the economy. And this, of course, is greatly aggravated by the growing interdependence of the entire world, the need of the Government of the United States to make international commitments with other governments, not only on arms control and defense alliances and other matters related to world peace, but also on the management of the world economy, which no single country, thanks to the interdependence you and others helped us to achieve, and that all of us wanted, that exists today.

And it is a fact today that the President of the United States is the only head of government in the civilized world who cannot commit the government he heads. It is much easier to identify this problem than to provide any solution, but it did seem to a number of us—I am glad to say you were among that number, Mr. Chairman—that it was time, some 5 years before the bicentennial of our Constitution, which certainly the framers thought we were going to look at and reexamine more often than we have, to put together a nonpartisan committee on the constitutional system that would study the problem I have tried to identify, and once it had defined the problem, to convince the American public that such a problem existed, and that the fault is more with the system than with any particular man, I think, in the White House or in the Congress, and to try to identify some possible solutions that could be raised to the level of public discussion by the time of the constitutional convention.

COMMITTEE ON THE CONSTITUTIONAL SYSTEM

Mr. Dillon and I agreed to serve as the cochairmen of the organizing group for such a committee. I am pleased to say that we had a very good response. We held a meeting, which you attended, Mr. Chairman, on October 29 and 30 of this year, and some 40 leaders of government, industry, the press, and the academic community were present, and at least 60 others who could not be present at that meeting expressed their interest in joining the work of the committee over the next year or two.

We have raised some money. We are beginning, with the help of some of our best political scientists, to identify and analyze these problems and their possible solutions.

I want to emphasize that we have no fixed ideas at this point. We include some admirers of the parliamentary system, but we certainly, as a group, have no idea that the parliamentary system should be transplanted to the United States.

We could very well conclude, after looking at all the possible solutions, that it might be better to leave things as they are, as my friend Mr. Reedy believes, and we may find some useful steps that could be proposed, either of a nonconstitutional variety, preferably, or of a constitutional nature.

I, myself, happen to favor the single 6-year term advocated by Senator Bentsen and many others, as a very good first step, primarily because it commands more support from ex-Presidents and from others in the entire community than any other proposal that has come forward up to the moment, and it will, at least, start the discussion going.

I personally would add to it, as many would, a 3-year term for Members of this House and perhaps a single election, an off-year election, every third year, both for Members of the House and for half of the entire Senate, so that we could get away from what I regard as the rather destructive biennial referendum that makes it necessary for Members of Congress, let alone the President, to begin running for reelection almost the day they arrive in Washington.

We have, as I said, no preconceived notion, but we are confident that the problem we have discussed exists, and that if we can identify it accurately, the public will come to recognize it, and once we have recognized it, we, like the Founding Fathers in Philadelphia, ought to be able to find a solution.

Thank you very much, Mr. Chairman.

[Mr. Cutler's paper, presented before the Thomas Jefferson Rotunda, follows:]

THE PRESIDENCY: CONCENSUS AND CREDIBILITY

Lloyd N. Cutler

It is a privilege to be in this Rotunda and feel the connection of the past, the present, and, I hope, the future on a subject that was very dear to Mr. Jefferson; but one on which, I think, he did not agree with his neighbor, Mr. Madison, who was of course the principle architect of our Constitution.

President Wilson, I believe, was also a man connected with this University. Back in 1884, long before he reached the White House, he wrote a book called *Congressional Government,* in which he criticized the stalemate produced by the separation of powers in our Constitution. At that time, if he had any remedy it was really to create a cabinet system complete with a prime minister within the Congress itself. He was rather unclear on just what he would do with the president.

By the time his book was republished in 1905 his views had already changed somewhat. By that time he saw possibilities for strong presidential leadership, at least in foreign affairs. In the preface to the 1905 edition of this book he wrote: "Much the most important change to be noticed is the result of the war with Spain upon the lodgement and exercise of power within our federal system. The greatly increased power and opportunity for constructive statesmenship given the president by the plunge into international politics and into the administration of distant dependencies has been that war's most striking and momentous consequence. When foreign affairs play a prominent part in the politics and policy of the nation, its executive must, of necessity, be its guide, must utter every initial judgment, take every first step of action, supply the information upon which it is to act, suggest, and in a large measure, control its conduct at the front of affairs, as no president except Lincoln has done since the first quarter of the nineteenth century when the foreign relations of the new nation had first to be adjusted." – And of course Mr. Jefferson was a leader in that adjustment. Professor Wilson continued:

> There is no trouble now [1905] about getting the president's speeches printed and read every word. Upon his choice, his character, his experience hang some of the most weighty issues of the future. The government of dependencies must be largely in his hands. Interesting things may come out of this singular change."

And by 1908, in his second major book about federal constitutional government in the United States, Wilson was already proclaiming the principle of a strong presidency. In practice, Wilson achieved probably as much, at least in the early days of his administration, as any president in the preceding century or more, accomplishments not to be surpassed until the time of FDR. The New Freedom, his New Deal or New Frontier, was, in its way, as sweeping set of reforms as the country has ever seen. It was conceived and first put forward from the White House almost in its entirety, in contrast to the practice of earlier presidents of not even proposing legislation to the Congress. And, of course, Wilson's power was magnified during World War I, as it always is in time of war. But even Wilson, despite his scholarly knowledge of our government, his remarkable skill as an orator, and the enormous respect in which he was held not only in this country but around the entire world, ultimately experienced failure because of our separation of powers and our system of checks and balances on the most important issue of his presidency, the League of Nations Treaty.

Since that time, the struggle between the president and the Congress has continued. We had a return to weak presidencies after Wilson, right up through Mr. Hoover. We had three essentially weak presidencies in a row, presidencies which did not believe in great initiatives. Then, of course, we had the very strong and unsurpassed presidency of Frankin Roosevelt. But since then we have had deadlock every time the president has sought to lead. Until recently, this has been true more in domestic than in foreign affairs, primarily because of the long continuing "cold war" consensus that existed for two decades after the end of World War II. Both parties were essentially agreed upon the need to form some sort of combination against the Soviets, the need to rebuild Europe, the need to provide aid all around the world in order to prevent what we saw as the world-wide threat of Soviet-type communism. This united the country as never before over a long period of time on a single foreign policy issue, and allowed presidents, including a president who disliked initiatives, Dwight Eisenhower, to exercise great leadership and power in the field of foreign affairs.

This stalemate, except in foreign affairs, held regardless of whether the president and the congressional majority in both Houses were in the hands of the same party. It is worth remembering that for almost exactly half the time since the end of World War II, under our system of separately electing presidents and members of Congress, the presidency has been held by the candidate of one party and a majority of a least one House, and often both Houses, of Congress has been held by the other party.

We are now reaching the period when the "cold war" foreign policy consensus has fractured. It is probably a natural consenquence of the fact that there has been no great war for almost thirty-five years, despite the dangers that some of us continue to see from the Soviet Union. But even the Soviet Union no longer seems as menacing as it did in the days of such great and noble plans such as the Marshall Plan, which helped to rebuild Europe. In Churchill's famous phrase, "Europe needs someone to unite against." Now we don't seem to have that someone sufficiently menacing to unite the European Free World as much as before.

In addition, we have experienced the enormous growth of world interdependence which has led to our domestic economic lives – in which we have always divided between capital and labor, between farmer and industry – now being very materially affected by events around the world and by our foreign policies. We now carry into foreign economic affairs all of the normal divisions that traditionally plague us in domestic economic affairs.

Because of the spread of nuclear weapons and the proliferation of new nation states, we also find ourselves enormously frustrated by our inability to use our awesome military power to have our way or at least to make clear to an aggressor nation that we dislike what it has done. The seizure of our hostages in Iran, the Soviet invasion of Afghanistan, any future Soviet intervention in Poland, the war in Vietnam itself, and the Soviet-supported Vietnamese invasion of Kampuchea, all of those episodes – dangerous as they are for us and much as they need a response from us – are episodes for which, the use of our military power is either an ineffective response—as in Iran—or a much too dangerous response, particularly if it involves actual conflict with units of the Soviet forces. Unless the stakes are serious enough to risk the danger of escalation into nuclear exchange with the Soviets, we have to reject it in favor of some other response. And all the other responses, whether they are grain embargos or Olympic boycotts, whatever they may be, are inherently divisive within our own country. All of this has made it much harder for the president to conduct foreign policy as the leader of a general consensus. The general consensus just isn't there anymore. For the past twenty years, at least, presidents have become more and more subject to congressional dissent and congressional opposition to their foreign policy and national security initiatives. It is no longer true for us, as it used to be as recently as 1961, that politics stops at the water's edge. Or that, as Mr. Wilson said in 1905, in foreign affairs the president "speaks for the United States."

Out of my own experience, I can cite to you the fate of the SALT II Treaty, negotiated under three administrations of both parties over a period of seven years, and eventually failing in the Senate for the inability to obtain a two-thirds vote. In part, it was because of Soviet actions and sheer misfortune, such as the discovery or rediscovery of the Soviet brigade in Cuba at a very untimely moment. But essentially it failed because, under the constitutional system, an enormous consensus was needed to produce the two-thirds vote required to ratify that treaty in the Senate. At any time at this point of the twentieth century, sixty-seven senators on any issue are very, very difficult to win.

The president's difficulties are well illustrated by the proliferation of congressional veto provisions that are now in so many statutes and have spread from domestic to foreign legislation. A congressional veto, as you undoubtedly know, is a provision in a statute delegating power to the president, or recognizing an existing power of the president, and providing that when he or an executive branch agency acts pursuant to that power, the action may be disapproved by a majority vote of either one House—and that's called a one-House veto—or both Houses—and that's called a two-House veto. A two-House veto was applicable in the case of the AWACS deal. The presidential or agency initiative is then void. Provisions of that type are now in several hundred statutes, all passed since 1940. Most of them are still in the domestic field. Some of them are rather appealing in a political science sense. They provide a way for Congress, which must necessarily delegate regulatory power to some part of the bureaucracy, if offended by a particular regulation issued by some agency, to set it aside by the majority vote of one House or two Houses. In fact, the 1980 Republican Platform specifically endorsed the legislative veto, and President Reagan, as a candidate, spoke warmly in favor of it on more than one occasion. But like every other president since FDR–and every attorney general since FDR's day–he has come to oppose the legislative veto both on constitutional and on policy grounds.

What has driven him to this position, and what drives every president to oppose the legislative veto in the end, is the brake it exercises on presidential initiatives in foreign policy, and how it prevents the president from speaking and making commitments on behalf of the United States. The President of the United States, I believe it's fair to say, is the only head of government, either in the Free World or in the world of dictatorships, who cannot commit the government he heads. We now have these legislative veto provisions in virtually all of our foreign aid legislation, in virtually all of our arms sales legislation, and in the statute authorizing transfers of nuclear fuel to other nations. And we also have the so-called War Powers Resolution, which provides that whenever the president introduces American armed forces into the sea, land or air space of another country, or into a situation in which the outbreak of hostilities may be imminent, he must report that to the Congress and the Congress, within a stated period, can pass a two-House veto which, without the president's approval, purports to require the withdrawal of those forces. I say "purports" because President Ford, who signed the War Powers Resolution, and his successors, have reserved the constitutional powers of the President to dispose our armed forces, whatever the limits of that power may be.

The AWACs issue, I think, is an excellent illustration of the problem created by the fracturing of the foreign policy consensus and the ability of Congress, through the use of the legislative veto, to check and reverse presidential initiatives in the foreign policy and national security field. It is true–it was almost no longer true in the AWACS case, but it remains true–that to this day, despite the existence of the legislative veto clause in so many foreign aid, military aid, and other foreign policy and national security statutes, no presidential initiative in the foreign policy or national security field has been formally upset and invalidated by a legislative veto. President Carter came very close of having it happen to him on the transfer of nuclear fuel to India. This was in 1980 when the president decided, for foreign policy reasons connected with the aid we were then giving to Pakistan after the invasion of Afghanistan, all of which naturally upset the Indians very much, that we could not risk default on a contracted shipment of nuclear fuel to India, even though the Indians had not complied with, or were unwilling to give the assurances that were required, under our non proliferation statutes enacted after the contract with India was made. President Carter finally prevailed on that veto by one vote. But even his own Majority Whip, Allen Cranston, opposed him and led the opposition.

If President Reagan had failed on AWACS, it would have been the first time since legislative vetoes have come into fashion that such a veto would actually have been invoked against a presidential initiative. Of course, there have been a number of occasions in which the prospect of defeat has forced the president to modify a commitment he has already made, and then, having gone through the shame or whatever you might call it of a need to renege on a commitment he had made to another country, he has been able to get the modified commitment sustained. But there has never been one reversed. Yet in the case of the AWACS, we have to note – and I am sure the Saudis and the whole world must have noted – that of 535 members of the House and Senate, at least 350 voted against the president compared to 119 in favor of the president. So if you add up all the legislators in the House and Senate, even his own party would not follow him on this point. His situation was not quite that bad, because no severe White House pressure was put on the House Republicans.

Because I feel so strongly against legislative vetos, both on constitutional grounds and on what you might call political science or policy grounds, I wrote a piece last August supporting President Reagan on the AWACS deal. And, as you may have noticed, in the last couple of weeks before the vote President Carter also came out publicly supporting the president on this deal. My reason, and it seems to me the overwhelming reason, for supporting the president is that the AWACS plane deal presents a complex and very delicate issue of national security and foreign policy on which sensible men could reasonably differ, on which, if they were the president, the members of Congress could reasonably have come down by a narrow majority on one side or the other. Precisely for that reason, once the president has committed himself, Congress ought to go along with the decision. It is as plain as day that once the president agrees to make the sale, the worst possible outcome of American foreign policy and national security would be for the Congress to reverse it. Congressional vetoes probably are unconstitutional in any event. True, Congress would have other ways of getting even if, as it may very well happen within the next year, the constitutionality of these vetoes is invalidated by the Supreme Court. The Court now for the first time has a case which gives it an opportunity to do precisely that.

For those of you who are interested in the constitutional question, the reason why many lawyers believe these veto provisions to be unconstitutional is that, apart from internal affairs, like the management of the House and the Senate themselves, Congress can only act by law or resolution passed by both Houses and signed by the president, or, if the president exercises his specific constitutional veto powers, both Houses override by a two-thirds vote. A one-House veto obviously doesn't meet that both-House test. Neither the one-House veto or the two-House veto provisions require the successful resolution to be signed by the president, thus depriving the president of his express constitutional veto power. To me, if you just peruse the text of the Constitution, that's crystal clear. Within the last year, one of the circuit courts of appeal, the ninth circuit, has expressedly so held, and that's the case that is now before the Supreme Court.

But leaving the constitutional issue aside, and assuming that legislative vetoes are constitutional, it seems to me very clear that at least in this foreign policy area they are extremely unwise. It's a fact today, as occasionally has been true in our past in the time of Wilson and Roosevelt, but it is certainly a fact today with our instantaneous world-wide communications, that it is the president we elect to lead the nation not only at home but also abroad. Other peoples and governments judge our purpose and resolve by what the president says and does, and their sense of whether he is speaking for us all. If his positions are successfully challenged within his own government, if his commitments are repudiated by a majority of the Congress, his authority and his credibility abroad are fatally weakened. Whatever he says, the world will doubt whether his own nation will back him up. And whatever our military or our economic strength may be, the world will doubt our capacity to use it.

It's perfectly true, of course, as we know from recent history, that a president can abuse his trust or make a major error of judgment. But we have constitutional remedies for those dangers. The Constitution forbids presidents to legislate or to declare war or to make treaties without the full concurrence of both Houses of Congress. It allows the House to impeach a president for high crimes and misdemeanors, and the Senate, after a full trial, to remove him from office. But when Congress delegates less cosmic decision-making power to the president, especially in the field of foreign policy, it seems to me that it would be bad practical politics for Congress to attach a condition that would permit a veto by one or both Houses of any particular decision he makes.

It's a truism today to say that we live in an increasingly interdependent, rapidly changing, and highly dangerous world. Events abroad can now shock our economy, endanger our security, and ignite the nuclear arsenals we have not yet learned to control. Governments fall, alliances shift, opportunities to preserve peace and freedom come up swiftly over one horizon and disappear as rapidly over the next. A great nation must be able to respond quickly and decisively to the modern world scene as it changes. It's no longer true that it would take three weeks to learn that some hostages had been taken in Iran, as it took to learn that General Jackson had won the battle of New Orleans. A great nation has to be able to move quickly to increase or decrease its military or economic aid, to change the disposition of its armed forces, and above all, to make credible commitments to foreign leaders about the assistance it will provide. Congressional reversal of a presidential action is bound to damage our national image, especially in a world where, as I have said, the heads of most other governments are able to commit the governments they head.

I believe that any congressional veto has these bad effects, even if the president's judgment appears to us in a particular case to be wholly and flatly wrong. Apart from a few diehards on either side I think most of us would agree that an issue like the AWACS issue, in the middle of the turmoil of the Middle East and our need somehow or other to bring the Arabs into a position of negotiation with the Israelis is, at worst, a very close and complex case. In such a case, to reverse the president does even greater damage to us all. We would be proclaiming that the president we elected to lead us and the Free World does not have sufficient power to commit us to sell five aircraft to a friendly nation. If we do not grant him the discretion to make that decision, how can we trust him with the nuclear button, which not even a congressional veto can recall?

Representative REUSS. Thank you, Mr. Cutler.

Before I go on to Mr. Anderson, perhaps I should ask you to restate for us, just so we have on the table, the major tentative recommendations you made in your "Foreign Affairs" article.

Mr. CUTLER. I'd be pleased to.

Representative REUSS. I believe that they are 6-year Presidential term and 3-year House term. You also had a dissolution vote of confidence procedure.

PROPOSALS TO STRENGTHEN THE POLITICAL PARTIES

Mr. CUTLER. Yes. In the article I wrote in 1980, I did list a number of potential solutions without advocating any one of them. Generally, they fall into two categories. One you might call the category of finding ways in which the President and the members of the Congress of his own party would come to share the same political fate, rather than our present situation, in which failure is always assigned to the President, and individual Members of Congress manage, in one way or another, to survive, as best typified by the fact that in the 1980 election, although President Carter lost California by 1 million votes, his majority whip in the Senate, Senator Cranston, I believe won reelection by 1 million to 1½ million votes.

In that category, the various solutions might be first of a nonconstitutional nature. To bring back, as Dumas Malone would like to bring back, some return to at least the principle of the congressional caucus of Jefferson's time, which nominated the Presidential candidates of each party. The Members of Congress in a party would get together in a caucus to nominate that party's candidate for President.

Representative REUSS. Not necessarily a member of the caucus?

Mr. CUTLER. Not necessarily a member of the caucus. That, of course, is something we could not wholly return to today. In fact, the national political convention was invented by President Jackson for his second term, because he knew he could not win the nomination of his party's congressional caucus. But there are ways in which the parties, as the Democratic Party is beginning to do this year, could bring either the Members of the Congress of that party or all of the candidates for the Congress in the same election as the Presidential election, into the convention process, in a way in which they might play a dominant role.

Another way is an idea once put forth by your colleague Jonathan Bingham, although I believe he is no longer saying this is the solution to our problems, and that is just as we are now required by the election laws and the Electoral College system to vote for President and Vice President as a package, you could not have voted for Jimmy Carter and George Bush the last time around. One might think of having a package for which you must vote, consisting of the Presidential, Vice-Presidential and congressional candidates of a party in your district. And that is another way of improving the possibility that the party Members in the Congress and the White House will share the same political fate and will, if elected, work together more closely to develop what you refer to as a coherent program.

PROPOSALS TO BREAK A DEADLOCK

The other general line of approach is a set of solutions that would enhance the power of the President or of the Congress to break a deadlock. One way is the 6-year term. The 6-year term, many people believe, would enhance, rather than deflate the political power of the President, his prestige throughout the country and his ability to bring public opinion behind the measures that he presents to the Congress.

Another would be based on the French system, under which the President—who, under the French Constitution, is a very powerful figure, perhaps even more powerful than the American President—has the right to dissolve the Legislature and to call for a new legislative election. The President of France today, as you know, has a 7-year term. We might adapt something like that so that the President would have the power to break an impasse, and if we did that, we might also want to consider, if the President chooses to call for a new congressional election, that Congress, by a majority, or perhaps a super majority, might have the right to call for a new Presidential election at the very same time.

Those are the principal types of suggestions that have been put forward. There are others that are of somewhat different nature, such as the line item veto, which would enhance the power of the President, and which was actually contained in the Confederate Constitution.

There are proposals to allow Members of Congress to serve at the same time in the President's Cabinet, either on a mandatory basis, for example that at least half the Cabinet has to consist of Members of the Congress, or on a voluntary basis.

Today, as you know, that is forbidden by the Constitution. No Member of Congress may hold any other office under the United States.

Another feature of the Confederate constitution worth looking at is one which allowed the Members of the Cabinet to go onto the floor of both Houses. In fact, there have been times in our history, as you know, that Presidents themselves have actually appeared on the floor of the House or Senate to present a bill.

That, I think, covers the general range of possibilities. For any one of these, while you might see a net favorable balance, you can certainly see potential objections.

We know of no instant solution to the problem we have identified, but we are confident the problem is there, that it needs a solution, and that with sufficient attention we will find one.

Representative Reuss. Thank you very much, Mr. Cutler. We will be back at you with questions, but now let's hear from John Anderson, our friend and former colleague.

Mr. Anderson, please proceed.

STATEMENT OF JOHN B. ANDERSON, FORMER MEMBER OF CONGRESS

Mr. Anderson. Thank you very much, Mr. Chairman. I have a statement of several thousand words or more. I am going to try to hit the highlights of that statement.

I am going to ask permission, therefore, that the entire statement be made a part of the record of these hearings.

Representative **Reuss**. Without objection, so ordered.

Mr. **Anderson**. Mr. Chairman, you are to be congratulated for convening hearings on a subject of such importance as the one we are addressing this morning. It reminds me of the words of Robert Hutchins that "The death of democracy is not likely to be an assassination from ambush; it will be a slow extinction from apathy, indifference, and undernourishment."

You are demonstrating by your willingness to chair these hearings that you are one of those who are not indifferent and are not subject to apathy.

I begin with a somewhat melancholy thought, that when it is necessary to examine fundamental beliefs, a society is, indeed, in trouble. Our political system is in need of repair. Yet I do not think we have reached a condition where, in the words of Livy, "We can endure neither our vices nor their remedies." There are remedies for our ills, we can identify them, and we can bear the costs of them.

Where do the problems lie?

WEAKNESSES OF OUR FORM OF GOVERNMENT

First of all, I think they lie with the party system, a party system that has become fragmented, polarized, and increasingly subject to special interest pressures.

What we have in America today is not so much party politics, but a combination of candidate politics and special interest group politics, each feeding upon the other to destroy the traditional party system.

Parties at the State and local level have become nothing more than legal conveniences by which ambitious people gain access to the ballot line.

I think the two traditional parties in this country have become more and more the creature of special interest groups. Neither has demonstrated itself to be capable of fashioning a truly integrated program for economic recovery.

If the Republicans are hopelessly committed to supply-side economics, the Democrats seem to be equally committed to demand-side economics and have not provided, to this point at least, effective or credible opposition to Reaganomics.

What we do need is a set of truly integrated and comprehensive economic policies that recognize the importance of both supply-side and demand-side policies. Neither party today, I believe, in view of the grip which has been fastened on them by special interests of one kind or the other, is in a position to provide that policy, but it is not simply the party system that is at fault.

The relationship between Congress and the President is a second area where there is much room for improvement.

Third, I think there is the problem of the organization of the executive branch itself. If we are to have an effective export policy, an effective job retraining policy—indeed, an effective industrial policy—there has to be something in addition to what we now have in the way of central Presidential control and direction over the execution of these policies.

In addition, there have to be mechanisms within Government to provide for the long-term planning that is now sadly lacking.

I don't happen to be one of those who believes that the problem is one that demands dramatic constitutional changes. It could be said perhaps that we have more anchor than sail in our system, but anchor is sometimes needed, as Watergate certainly showed, and sail is usually forthcoming in times of crisis.

I think that constitutional change can too easily create false expectation of dramatic improvement and, when that improvement is not forthcoming, a willingness to engage in even more Constitution making in the future.

So I would, Mr. Chairman, suggest that, rather than embarking on basic constitutional change, let us rather focus on areas of reform which can be effectuated within the constitutional rules of the game as they now exist.

And I would briefly mention three of the areas where reform is needed, where I think the results could be positive and significant. I have already, I think, said with respect to electoral reform that there are three present problems.

One of them is the power of special interest groups.

Second, I think there is growing evidence of irrationalities in the Presidential nominating process.

And, third, there is the existing structure and the immobility of our present party system.

PROPOSALS TO REFORM CAMPAIGN FINANCING

I think there ought to be a system of public financing for Senate and House candidates modeled after the Presidential system which went into effect in the 1976 election.

It ought to consist of matching grants for primary candidates and full funding for party nominees. It ought to be done with a formula that reflects media costs for the respective States and districts.

Under my proposal, political action committees, whose contributions would be limited, of course, to the primary phase, would no longer be permitted in the general election. I think those contributions ought to be limited to contributions of $1,000, which is the present limit on individual contributions.

You have the problem of independent expenditures, a practice that apparently, according to the Supreme Court decision in *Buckley* v. *Valeo*, cannot be directly controlled or you would violate the first amendment.

Congress could, however, in response to the problem of independent expenditures, enact a fairness rule for all television and radio stations that would require the station to provide free time to all opponents of candidates or parties on whose behalf advertising was taken by a person or organization other than the candidate's authorized committee.

The same law might also enable the station to charge substantially higher fees for that kind of advertising and be under no obligation to take it.

As a practical matter, I think that would mean that the advertiser would be buying time for the opposition as well as for the candidate that he was seeking to support, and this might be a very powerful deterrent to the extreme kind of negative, particularly negative, television advertising that has occurred recently in the name of independent expenditures.

PROPOSALS TO STRENGTHEN POLITICAL PARTIES

Let me then quickly go to the point of doing something about the present party system. The primaries of course have been often, and not without justification, criticized. What I am afraid of, however, is if you were to translate power from the primary sequence back to State and local officials that you would thereby dramatically increase the power of big business within the Republican Party and big labor within the Democratic Party.

These forces that exercise power, locally as well as nationally, were the big losers when primaries replaced the boss and the Governor, as it did around the turn of the century when the first open primary laws were initially adopted, and they were the key variables in the Presidential nominating process.

Business and labor influenced the two conventions largely through their ability to influence local officials. It was this connection that the primary expansion which took place in the 1960's and the 1970's destroyed.

Bringing it back is not likely to do more than to recreate two parties polarized around two traditional interest groups, each with a perspective too narrow to enact the broad-based reforms that are necessary for economic recovery.

At the risk of being somewhat self-serving, Mr. Chairman, I think that if we had a new Centrist Party in this country which would build into its charter powerful rules to keep political action committees and special interest groups at arms-length and which, by the Centrist nature of its voters, could almost promise that a Presidential primary sequence would produce both new blood and Centrist nominees who have elected to provide the country with a truly integrated economic recovery program, we might not be as discouraged as we are at this present moment.

I think that is going to require that we establish a standard of fairness that does not now exist for new parties.

I know from painful personal experience the way in which ballot access and campaign finance laws have discriminated against independents and new parties, and I think to shut them out of the political system is to deny ourselves the possibility of infusing some of the new ideas and the reform that is desperately needed.

Let me quickly pass on then to something that is quite different from the party system of which I have just been critical, and that is the budgetary process.

I was in the Congress when we adopted the 1974 Budget Control and Anti-Impoundment Act. Today, 8 years later, I think the budget process is out of rational control.

REFORM OF BUDGET AND FISCAL POLICY

I would propose for your consideration, Mr. Chairman, three basic reforms: One, a 2-year budget cycle—and that is not a terribly radical proposal. It has recently been publicly endorsed by both Mr. Bauser, who is the Controller General, head of GAO, as well as Ms. Rivlin, head of the Congressional Budget Office. A 2-year budget cycle.

Second, a discretionary tax adjustment power should be given to the President along with a set of countercyclical trust funds which could be used to stimulate the economy in times of recession.

Going back just very quickly to the 2-year budget cycle proposal, the President, I think, should offer his budget on January 1. For a new President of course it would have to be done on the 20th, but provisions ought to be made for the participation of the incoming President's staff in the budget process prior to the inauguration. It ought to be one of the most important aspects of the transition, and it is not now the case.

I think, under the Budget Control Act, that the budget resolution could be passed by May and a final budget enacted by July 1 for a 2-year period. Then perhaps have the additional requirement that changes in the budget, once it has been adopted, require a three-fifths majority in order to be amended.

Accompanying the 2-year budget process, there ought to be discretionary authority for the President to raise and lower taxes within preset limits. The Congress perhaps could be asked to reenact that authority every 2 years.

Congress could specify in advance in that legislation the conditions under which the President could raise and lower taxes, such as when the inflation or the unemployment rates exceeded certain levels or dropped below other levels. This might be different, obviously, for different forms of taxation.

Third, I think that in addition to greater flexibility in the taxing power the Government needs more spending flexibility. One of the current problems of countercyclical policies is the inability of the President and the Congress to provide timely responses to the swings of the business cycle. Accelerated public works all too often start so late that they are in danger of accelerating the boom rather than alleviating a recession.

I proposed a couple of years ago in the campaign that we ought to have a trust fund to address the problems of decaying community infrastructure, the decay of our community capital plant, bridges, streets, and so on. This is a suggestion that is being widely talked about today.

I think it ought to be done in connection with the creation of a trust fund that would be provided with specific dedicated sources of revenue that would enable us to assign it a predictable amount of revenue year by year. Over the cycle of the trust fund the entire amount could be paid out.

Congress would have to approve the projects. Congress would prioritize the programs, set the overall spending levels, but provide in advance, not in the throes of crisis, for a trust fund with dedicated sources of revenue to deal with the problem of decaying infrastructure.

I think also that it would make possible something I mentioned earlier in my statement that I think is totally lacking today, and that is long-term planning.

We may not go to the most sophisticated kind of input-output planning. I saw recently when I was in the office of Professor Leontief, who is in experimental input-output planning, a stack of documents about 2 feet high which went into the making of the most recent Japanese economic plan.

I happen to believe that, without necessarily adopting that theory in toto, there is much to be said for substituting some long-range planning for the ad hockery of our present approach to economic problems.

REFORM OF EXECUTIVE BRANCH

Finally, I mention three areas of reform. One obviously is in the organization of the executive branch itself. Here it is not very easy to prescribe solutions.

Should the OMB be expanded in scope and authority? Should the Treasury Department, the senior Cabinet agency responsible for economic matters, be given additional responsibility? Should there be super coordinating committees?

I can think of some drawbacks, frankly, for each of those proposals, but something has got to be done within the executive branch itself to improve the present organization and coordination of economic policy.

I go back to the time of Richard Nixon, when he proposed, as I am sure the chairman will recall, the creation, I think it was, of four super Cabinet agencies. He didn't get a very warm reception, but I think there were other problems beginning to mount at that time that tended to take attention away from what might have been a good idea. Certainly one of these super departments might have been in charge of better coordination and planning of economic policy to replace what I think is the very fragmented condition that exists today.

The problems in conclusion, Mr. Chairman, I think, are soluble within our existing constitutional framework if we will approach them with a nonideological commitment to basic institutional reform.

Adlai Stevenson once said, "Democracy cannot be saved by supermen, but only by the unserving devotion and goodness of millions of little men," and in that spirit of democratic participation let us seek to restore the trust between the governors and the governed. Let us reform our institutions. Let us show the world that democracy can, indeed, confront economic crisis with a steady gaze and a reasoned response.

Thank you.

[The prepared statement of Mr. Anderson follows:]

PREPARED STATEMENT OF JOHN B. ANDERSON

Mr. Chairman, you are to be congratulated for convening hearings on a subject of such fundamental importance as the one we are discussing today. It is not since the 1930's that serious people have asked the question: can democracy survive economic catastrophe? Then, in a world of waxing communism and waxing fascism, democracy was globally in retreat as these competing ideologies asserted their place in the sun and their claim to be the wave of the future. Today, instead of subtle attacks we face a slow erosion of values and institutions. We are reminded of the words by Robert Hutchins that, "The death of democracy is not likaly to be an assassination from ambush. It will be a slow extinction from apathy, indifference, and undernourishment."

You have asked us to testify about our beliefs in the system -- about the soundness of our basic governmental structure. Let me begin with a melancholy thought: When it is necessary to examine fundamental beliefs, a society is, indeed, in trouble.

Our political system is in need of repair, but we have still not reached that condition where, in the words of Livy, "We can endure neither our vices nor their remedies." There are remedies for our ills; we can identify them, and we can bear the costs of them.

Where do the problems lie?

First, they lie with the party system that has become fragmented, polarized and increasingly subject to special interest pressures.

Our political parties -- as traditionally constituted -- began to decline about 20 years ago under the impact of television media, the welfare state, the primary system, the imperatives of campaign finance, and the parties' own inability to adapt to the changing political and economic circumstances of the second half of the 20th Century. This process of decline is far advanced today.

What we now have in America is not party politics, but a combination of candidate politics and special interest group politics, each feeding upon the other to destroy the traditional party system. Parties at the state and local level have become mere legal conveniences by which ambitious people gain access to the ballot line. After they are nominated, candidates no longer need the party to win elections. They now create their own campaigns, hire their own campaign consultants, raise their own money, and, if they win, they are loyal only to themselves and to their financial backers. We no longer have a viable two party system -- we are fast approaching a zero-party system.

As the two traditional parties become more and more the creature of special interest groups, neither is capable of fashioning a truly integrated program for economic recovery. The Republican Party remains hopelessly committed to some form of supply-side economics with its emphasis on tax cuts for the wealthy and for business. While many of the tax cuts for business are desirable, they alone will not solve our economic difficulties, nor can they form the basis of a truly integrated plan for economic recovery. We cannot base a national economic policy exclusively upon a program of laissez-faire. It will take more than the invisible hand to guide our national destiny. Furthermore, and this also will not change, the

Republican Right is committed to such a vast defense buildup, that it is willing to sacrifice all its economic policies upon the altar of Mars.

If the Republicans are hopelessly committed to some form of supply-side economics, the Democrats are equally committed to demand-side economics. They have provided no effective or credible opposition to Reaganomics. Their policy of spending our way to prosperity simply means more inflation, more high interest rates, and no sustained recovery.

We need a set of truly integrated and comprehensive economic policies that recognize the importance of both supply-side and demand-side policies. Neither party today is in a position to provide such a policy.

But it is not simply the party system that it is at fault. The relationship between Congress and the President is a second area where there is much room for improvement. Let us at the beginning, however, explode the myth of total paralysis. President Reagan has had his way with Congress. We are in a recession today not because Congress failed to enact the President's program, but because that program itself was faulty. The last twenty years have seen dramatic legislative activity in the field of civil rights, environmental protection, election reform, and foreign policy. The Congress also proposed an ERA amendment to the Constitution. And, just a few years ago, the Congress forced the resignation of President. Our national legislature has certainly given many signs of its ability to act.

And yet, I also have other recollections of Congressional behavior. Comprehensive energy legislation, gun-control legislation, a CIA charter, genuine tax reform as opposed to simply tax reduction -- in all these cases the power of special interests has prevailed, legislation has been eviscerated, and the results -- if any -- have been pathetic. The President shares some of the blame for this record of failure, of course, but the real villian is the special interest PAC. Take away this intense power of money and the system can work more in the national interest.

Controlling PACs, however, is simply not enough. One vital aspect of the Presidential-Congressional relationship needs special attention: fiscal policy. The budget process, taxing authority, and spending authority, so vital to our ability to fight recession, need to be reshaped to give the Executive more power to act in a crisis, while retaining proper Congressional supervisory functions.

A third problem is the organization of the executive branch itself. If we are to have an effective export policy, an effective job retraining policy -- indeed, an effective industrial policy -- there has to be some central Presidential control and direction over the execution of these policies.

The problems are great and the agenda is a long one.

I do not believe that the answer to these problems is dramatic constitutional change. It is, perhaps, true that we have more anchor than sail in our system but anchor is sometimes needed (as Watergate has shown) and sail is usually forthcoming in times of crisis. As I said above, our current problem is the nature of the course we have charted, not our ability to sail that course.

Furthermore, constitutional change can easily create false expectations of dramatic improvement, and, when that improvement is not forthcoming, a willingness to engage in even more Constitution-making in the future.

With all due respect to the Congress, I am not persuaded that major efforts at Constitution writing will themselves avoid degeneration into special interest brawls. And I am also not persuaded that the ability of Congress to foresee the consequences of its action will exceed that of the Democratic Party reformers of the late 1960's who wrote a set of party rules, which, whatever their merits, did not in many cases produce the intended results. Winston Churchill once observed that democracy is the worst form of government -- with the exception of all other forms of government. The same might be said for the U.S. Constitution with respect to proposed alternatives. For example:

-- It has been suggested that the President be limited to a single six year term. Yet this seems to be a recipe for Presidential weakness, not vigorous leadership, since he or she would be a lame duck from the start.

-- It has been suggested that the President, the Senate and the House of Representatives all be elected at once for four years -- adopting the practice of many states. Variations suggest six year terms. This is supposed to give the President more power over those who are elected with him. Yet most political observers agree that the coattail effect has diminished greatly in recent elections -- and there is no reason why this arrangement would by itself reverse the trend. Furthermore, the longer terms eliminate the opportunity for voters to produce a mid-term correcton. This might make it easier to "stay the course," but that is a debatable virtue.

-- It has been suggested that members of Congress be permitted to serve concurrently in the Executive Branch -- such as in Cabinet posts. This would, it is argued, make government more unified and more purposeful. I disagree. The Founding Fathers precluded this arrangement because they were familiar with British practice in the 18th century where the King controlled Parliament by dangling political plums in front of members. These plums -- usually cabinet positions -- enabled the King to create a body of favorites through which he tried to control the legislature. The result, however, was not unity in government, but enormous court intrigue, legislative fragmentation, and unstable ministries of such cosmic incompetence that they succeeded, among other things, in provoking the American revolution. It was not until the British established the practice of cabinet responsibility to the House of Commons instead of to the King, that a workable Parliamentary system as we know it emerged.

Turning to the Parliamentary system itself, which has also been suggested as a possible alternative to our current constitutional structure:

I do not believe that its virtues outweigh its vices. Are we saying that since our system has produced economic stagnation that we must, therefore, adopt the British model of government? Parliamentary systems are notorious for producing mediocre results. They usually elevate the safe, the unimaginative and the lowest common denominator. (In this respect, Mrs. Thatcher, is, perhaps, an exception). Prime Ministers are usually everyone's third choice. It took two World Wars to elevate Lloyd George and Winston Churchill to the premiership. They never would have made it in peacetime. The norm in Britain during the 20th century has been Bonar Law, Stanley Baldwin, Nevill Chamberlain, Clement Attlee, Alec Douglas-Hume, Edward Heath, etc. Despite a few Warren Hardings, we have usually done much better. The American system enables new blood to enter at the top. This does not always happen -- and new blood is not always successful -- but it does provide an opportunity for genuine reform, fresh ideas and new leadership that is

> usually lacking in alternative systems. If the President becomes more enmeshed in the politics of Congress the results will probably be a weakened Presidency, not a unified government.

Rather than embarking on basic Constitutional change, let us rather focus on areas of reform which can be effectuated within the Constitutional rules of the game. Today, I wish to discuss three of these areas where reform is needed and where the results will be both positive and significant. These are the areas of electoral reform, budgetary reform and organizational reform.

With respect to electoral reform, there are three pressing problems: 1) the power of special interest groups, 2) the irrationalities of the Presidential nominating process, and 3) the existing structure of the party system.

Special interest groups, it is widely recognized, are fragmenting Congress and dominating the Presidential nominating process. The evils of such "factions" have been recognized since James Madison wrote the Federalist Paper No. 10. This eminently practical constitutional architect stated, however, that the causes of faction could never be removed -- but that the effects of faction could be controlled. This is certainly still true.

The power of special interest groups is financial -- and that can be controlled. I recommend the following:

- There should be a system of public financing for Senate and House candidates modeled after the Presidential system. This should consist of matching grants for primary candidates and full funding for the party nominees. This should be done with a formula that reflects media costs for the respective states and districts.

-- Political Action Committess -- whose contributions would under this system be limited to the primary phase, as in the Presidential election, should be limited to contributions of $1000, the same as for individuals.

-- The expenditures by PACs and others "on behalf of" candidates as so-called "independent expenditures" is a growing problem at the Presidential level. It would immediately become even more of a problem than it now is at the Congressional level if public financing were instituted. This practice cannot be directly controlled, acording to the Supreme Court, because to do so would be to infringe upon freedom of speech. There is, however, a remedy which will mitigate the effects of this new evasion. Congress could enact a "fairness rule" for all television and radio stations which would require the station to provide free time to all opponents of candidates or parties on whose behalf advertising was taken by a person or organization other than the candidate's authorized committee. This same law could also enable the station to charge substantially higher fees for such advertising and be under no obligation to take it. As a practical matter, this would mean that the advertiser would be buying time for the opposition as well as for the candidate. I believe that this would be a powerful deterrent and would also meet Constitutional standards.

These three proposals would seriously curb the power of special interest money at the Federal level and would reverse the centrifugal forces that this money produces. This reform, however, will not by itself, solve the problem of polarization that now besets the two traditional parties. Factions and interest groups will still be able to provide the kind of backing throughout the primary season that gives cause candidates an edge over the more traditional centrist candidates. The Presidential nominating process itself must be reformed.

As a person who is no longer a member of either traditional party, it is presumptuous of me to suggest to these parties how they should run their affairs, but let me make a few observations from experience about how the rules of the game can affect the outcome of the game.

What kind of Presidential candidates do we want? How can we give to the voter a choice between excellent people, rather than a choice between evils? If one sticks to the two party system, then it is necessary to consider the mechanisms by which candidates can be generated which appeal to a broad national constituency and who are also not simply party hacks elevated to the nomination because they are safe, secure and everyone's lesser choice.

First, it is no longer an option to go back to the old system of strong state parties whose representatives met in convention to sift among candidates (some of whom had won a few primaries) to select a person who both represented party principles and who had a chance to win. The strong state parties with their traditional bosses and powerful governors don't exist anymore. The state parties in most cases are as fragmented as the national parties. Torn by factions, they, too, are dominated by special interests.

Current suggestions for reform of the nominating process focus on two variables: first, the nature and timing of the primaries, and second, the role which elected and party officials should play in the processs.

In the first category we have seen suggestions for national primaries, regional primaries, a shorter season of primaries, more open primaries, more closed primaries, binding and non-binding primaries, and a rich variety of geographic and proportional schemes to divide the delegates between the candidates. Although the nature of these proposals can affect the ultimate outcome, the key differences among nominating processes that are based largely on primaries are 1) the degree to which the primaries give a reasonable chance to unknown candidates to become known, and 2) the degree to which the primaries are structured to produce a winnowing process that narrows the field until only one candidate remains at the end of the season. If there is a long primary process, state by state, new blood is encouraged, but so are special interest "cause" candidates. If the process is short, or if it is conducted on a regional basis, the result will be either well-known candidates who have been around before, or candidates who can raise enormous amounts of cash. There are obvious problems with each method.

The Democratic Party has attempted to address these problems by requiring that a certain percentage of convention delegates be chosen from elected and party officials. These reforms will have little effect in 1984 because the numbers are too small to make a difference in a system where primaries and FEC performance requirements for matching funds will ruthlessly winnow candidates like Agatha Christie murder victims until only one remains by convention time. If, however, the traditional parties selected, let us say, half their convention delegates from elected or party officials -- then it would make a difference. The effects of the primary sequencing would be reduced and a more centrist result would, perhaps, occur.

But what then would happen? By transferring the source of power within the nominating process back to governors, mayors and local party officials, the power of the PAC's would instantly reassert itself since the campaign finance laws in most states are weaker than the federal laws. A much broader agenda of campaign finance reform would then be necessary.

Furthermore, a translation of power from the primary sequence back to state and local officials would dramatically increase the power of big business within the Republican Party and big labor within the Democratic Party. These forces, which exercise power locally as well as nationally, were the big losers when the primary replaced the boss and the governor as the key variables in the Presidential nominating process. Business and labor influence the two conventions largely through their ability to influence local officials. It was this connection that the primary explosion of the 1960's and 1970's destroyed. Bringing it back is not likely to do more than to recreate two parties polarized around two traditional interest groups, each with a perspective too narrow to enact the broad-based reforms necessary for economic recovery. You can now see the source of my pessism about the future performance of the two traditional parties. All I can say is that if campaign reform is to be effective, it must include the state and local levels. It would be self-serving of me to sit here today and suggest to you that the only way out of our difficulties is to establish a new centrist party which builds into its charter powerful rules to keep PACs and special interest groups at arms length and which by the centrist nature of its voters could also promise that a Presidential primary sequence can produce both new blood and centrist nominees who, if elected, can provide the country with a truly integrated economic recovery program.

But I will mention that a standard of fairness should be established for new parties. I know from experience the way in which ballot access and campaign finance laws discriminate against independents and new parties. This is not only wrong; it is damaging to the system even as it now exists. If both major parties can continue to assume that the other party, if elected, will prove to be no better an alternative, then it has no real incentive to reform itself. All it needs do is wait, hope the other side makes a real mess of things and then return to power. This is the strategy of the Democratic party in the

1980's just as it was the strategy of the Republican party in the 1960's. This cycle of mediocrity will only be broken by the threat of entry (or the actual entry) of new political forces offering better alternatives.

It is not enough simply to revise the process by which we select our leadership. That leadership must have more effective tools to fight economic adversity. The process of economic decision making must be reformed. Let me share with you some preliminary thoughts about this central topic.

The budgetary process is now out of rational control, as the events of recent months and recent years have shown. Basic reform is necessary if sound fiscal and budgetary procedures are to be reestablished. I propose for your consideration three basic reforms: a two year budget cycle, a discretionary tax adjustment power to be given to the President, and a set of counter-cyclical trust funds which can be used to stimulate the economy in times of recession. This package will enable the government to pursue a much more rational and effective fiscal policy.

The two year budget cycle is not a new proposal. It could be enacted in several forms. I propose the following:

The President should offer his budget on January 1. (When there is a new President, this should be on January 20. Provision should be made for his staff's participation in the budget process prior to his inauguration.) The equivalent of the current budget resolution should be passed by May. The final budget should be enacted by July 1. It should be for a two year period. If Congress cannot act this fast, then let the October deadline be retained -- but July is preferable for planning purposes.

Changes in the budget could be enacted by a 3/5 majority of Congress.

The advantages of this proposal would be that the newly elected Congress, direct from its election mandate, would enact a budget for its own life. It would not be subject to the election year pressures that attend every second budget. Special interests would not have quite the same influence that they currently do in the election year budget process. Also, a longer planning horizon would be available to federal agencies.

Accompanying the two year budget process should be a discretionary authority for the President to raise and lower taxes within pre-set limits, which Congress would be required to re-enact every two years. Congress could also specify in advance the conditions under which the President could raise and lower taxes -- such as when the inflation or unemployment rates exceeded certain levels or dropped below other levels. These might be different for different forms of taxation and would apply primarily to income taxes and payroll taxes. The President's action in each case could be subject to a legislative veto -- if the courts uphold the constitutionality of legislative vetos.

In addition to taxing flexibility, the government needs more spending flexibility. One of the current problems of counter-cyclical policies is the inability of the President and the Congress to provide timely responses to the swings of the business cycle. Accelerated public works, for example, start so late that they accelerate a boom rather than alleviate a recession.

This problem will persist -- but there are some approaches that can be taken to deal with it. One is to make larger use of trust funds -- and to give them an anti-cyclical role.

For example, two years ago during the 1980 campaign I proposed that we create a trust fund to address the problem of decaying community infrastructure: the decay of our community capital plant -- its bridges, streets, water mains, etc. This is a suggestion that is even more pressing today. We could, for example, create a trust fund and provide it with a dedicated source of revenue. This would enable us to assign it a predictable amount of revenue year by year. A percentage of this would become available every year for expenditure -- the rest would be placed in reserve. Over the cycle of the turst fund, the entire amount would be spent. During expansionary periods, however, this amount would be lowered at the discretion of the President -- subject to Congressional guidelines. It would be raised in times of recession. Therefore, the spending levels would be predictable over long periods of time, but could be quickly adjusted in depressed or expansionist times to play the counter-cyclical game.

Congress would approve all projects in advance, prioritize the programs, and set the overall spending levels for the long term. The programs then would be taken off the shelf as needed. By spending more in slack times, the government should be able to get a better price for its purchases.

The advantage of this system would be that long-term planning would be possible, yet counter-cyclical tools would be preserved. For example: the steel industry would know that a certain amount of money would be spent over the next ten years in bridge construction requiring steel. They then could plan their long-term capital spending with this in mind -- even though they might not know how much might be spent in a given year.

Taken together, these measures would give powerful economic tools to the government. They would make the governmental and private planning processes much easier. They would be subject to Congressional scrutiny. Because of the way in which these suggestions would be instituted, interest group politics could to some degree be minimized.

A third major area for reform is in the organization of the executive branch itself. Here the problem is very complex and my thoughts are quite preliminary. Economic policy-making is so dispersed among agencies that realistic coordination is today almost impossible. The OMB, the FED, the CEA, the Treasury, the Departments of Commerce, Labor, Agriculture, and Defense are all major players. There are many other minor and not-so-minor actors.

Traditionally the President has used OMB as his central coordinating agency for fiscal policy; monetary policy (until recently, perhaps) has been independently formulated by the FED. If, however, we are to have a meaningful industrial policy, we will have to coordinate various parts of it which today are housed in separate agencies. Export policies, tariff negotiations, worker retraining programs, energy policy, government purchasing policies, government research and development policies, and many others, if properly coordinated, can become as important to our long-term economic health as fiscal and monetary policies are today.

Yet the task of coordinating these policies is staggering. We cannot have an effective industrial policy until this obstacle is overcome. This is one reason why the government relies almost exclusively upon fiscal and monetary policies when it attempts basic economic reform. But in times of recession/depression, these are not enough.

It is not easy to prescribe solutions. Should the OMB be expanded in scope and authority? Should the Treasury Department -- the senior cabinet agency responsible for economic matters -- be given additional responsibilities? Should super-coordinating committees be established? Each of these proposals has drawbacks, but something must be done if coherence is to be restored. We may have to contemplate some very basic reshuffling of the cabinet posts themselves to obtain the kind of central direction that economic recovery necessitates.

The problems before us, Mr. Chairman, are great. They are, however, soluble within our existing constitutional framework, and they will remain so if we approach them with a non-ideological commitment to basic institutional reform. By improving the process by which we elect our leaders, and by giving them more authority to act when they are elected, we can reverse two decades of drift.

Adlai Stevenson once said, "Democracy cannot be saved by supermen, but only by the unswerving devotion and goodness of millions of little men." In that spirit of democratic participation, let us restore the trust between the governors and the governed, let us reform our institutions, and let us show the world that democracy can, indeed, confront economic crisis with a steady gaze and a reasoned response.

Representative REUSS. Thank you, Mr. Anderson.

Mr. George Reedy, please proceed.

STATEMENT OF GEORGE E. REEDY, NIEMAN PROFESSOR OF JOURNALISM, MARQUETTE UNIVERSITY, MILWAUKEE, WIS.

Mr. REEDY. Mr. Chairman, I do have a prepared statement, which I would like to have inserted in the record for purposes of coherence. And I'd like to summarize it very briefly.

Representative REUSS. Without objection.

Mr. REEDY. Let me start by saying I rather regret this is one of the last times that I, as a constituent, can appear before my Representative. And one of the reasons that I'm sorry about that goes to these hearings themselves, which I think can perform an extraordinarily valuable service.

Over the last few years I have attended many meetings at which people have been proposing the reorganization of our Constitution. I have heard proposals ranging all the way from one single, 6-year term to an outright parliamentary government.

I believe that most of those proposals are going to continue to be conversation for a long time to come for one simple reason. I don't think that they are really going to the heart of the problem.

Most of the hearings that I have read or that I have attended, or most of the discussions in which I have participated have assumed that our problem is that of efficiency, that if we can reorganize our Government in such a manner as to make it more efficient and more coherent, we then will have a solution to our economic problems.

There is a general feeling—I think the word "paralysis" is too strong—I've heard that thrown around quite a bit. But I still flew from Milwaukee to Washington without any great problem, ate on the way, and will fly on back.

People are still eating—not as well as they should be. There are many fears. But I think "paralysis" is too strong.

PROBLEM IS IN GOALS AND POLICIES, NOT STRUCTURES

Nevertheless, to the extend that the word has validity, I would like to suggest that the real problem is not necessarily one of efficiency, but that it is more likely to be one of our not knowing what to do with our society.

Most of the proposals that appear before us are proposals of a rather speculative nature.

For example, I heard Senator Bentsen talk about the 6-year term this morning. You know, there's about 150 years of history on the 6-year term. And I wish people would consult that history sometime.

Senator Bentsen made the point that it was first proposed by Andrew Jackson, which is correct. It was picked up by almost every nation in South America. If you go down and check the constitutions, you will find they imitate ours very closely, except for the 6-year term which gave them Allende.

Some of the other proposals are usually intended to relieve the presidents of some of the ordinary checks and balances of the government.

Again, there have been some fields in which the U.S. President has been extraordinarily successful in removing himself from some of the checks and balances of the Government. That's what gave us Vietnam, for instance.

I am not quite ready to jump into a question of changing until we take a look at something deeper.

I rather appreciate Mr. Cutler's effort to save me from testifying by saying I don't want anything done. But it is not quite an accurate summary.

What I am saying is that what is missing in all these discussions is a general analysis of what has happened to our society and what we propose to do with it.

The question I wish to present is what is it that we are going to do with our society under any form of government, under any type of government reorganization.

I'm using the word "we" deliberately. And by it, I mean a politically effective "we." That is why I'm suggesting if there is paralysis or anything approaching it, it may or may not be due to our form of government, but I think it may be very definitely due to the fact that we do not know what we want to do.

Everyone speaks of profound changes. And there are, unquestionably, economists here and political leaders somewhere else who do have some idea of what to do about it. But I do not know of anything that is on the politically effective level. And until it does reach that level, I think we are just going to have conversation.

I think what has really happened to us is a change so profound in our society, so deep, so thorough, that our real problem is bewilderment as a society, not in terms of the political system itself.

One always sees the world rather personally. It has struck me as being very, very significant that I was born into a family of steel mill workers and lumberjacks. And now, many years later, more than I care to count, there is not one member of my family who is working either as a steel mill worker or a lumberjack. For that matter, there is not one member of my family working in anything that would be "productive," in the old sense of the word.

ECONOMIC PROBLEMS WE NEED TO CONFRONT

I think that we have to realize that what is happening to us are changes in our economy that are so deep that the customary approaches of programs of supply-side economics or demand-side economics or encouraging investment or anything of that nature are really not the solution to our difficulties.

When I look at what has happened in recent years with the continuing investment in plants, what I find is that most of the plant investment—most of the new structure that in the old days created jobs are now at a point where they displace jobs.

I know the classical theory is that when the production worker is displaced he's going to move over to the service industries. But I have a feeling that the service sector of the economy is now also becoming automated. I have a feeling we are living in a society which, for the first time in history, is creating surplus human beings.

I am not an economist. I am not a person who has at my command the facilities to really explore this thing. But I think some of the elements in our society are so obvious that certainly they do require some deeper investigation.

What have been the most burgeoning elements of our economy in recent years? The tourist industry probably. I have not seen any figures on it; I imagine they are available. But how many people in the United States are devoting themselves today solely to the business of moving a person from one place to another or moving him back?

What seems to be the most rapidly growing sector of our economy today? Bookkeeping and variations of bookkeeping.

Mr. Chairman, what I am suggesting to you is that we are a Nation accustomed to living on production for so many years that now that we are moving into an area where people are surplus to production, we don't really know what to do about it. And to suggest changing our Government now, at this particular point, when we really don't know what we're going to do after the change is a bit premature, least to say foolhardy.

I am not opposed to change, not at all. But what I want to find out first is what it is we have to do that requires the change. And this I have yet to see.

PROPOSAL TO REVIVE THE TNEC

I believe this committee is particularly well adapted to do something. This is a group which I believe can revive the concept of the old Temporary National Economic Committee.

When I first came to Washington as a very, very young newspaper man—God, I hate to think back that far—one of the first stories I covered was the hearings of the TNEC, which were headed by Senator Joseph O'Mahoney. And I believe his vice chairman was Judge Hatton Sommers of the Judiciary Committee.

At the time, I resented it. I was fresh out of college, where I got the impression that economics certainly deserved the term "gloomy science." I have since realized what that committee really did. It was set up primarily to investigate monopoly, but it did not confine itself to that investigation of monopoly.

What it did was make a very broad and very thorough-going assessment of our economy. For the first time, we brought together in one place all of the various concepts. They were digested. They were put into some sort of a coherent form.

And the TNEC has since been criticized for its lack of specific recommendations, but that was not the point. The point was that we got the picture of our economy as it had evolved in the mid-1930s. And out of that picture grew a realistic feeling of what we had to do to revise that economy.

Mr. Chairman, I would suggest that it is time to revive that concept.

The TNEC was a group, by the way, which was not solely confined to the congressional, the legislative branch of the government.

It was a combination of some of the Federal agencies that included on its membership such people as Thurman Arnold, the Assistant Attorney General; Herman Oliphant from the Department of Treasury; Isadore Lubin from the Department of Labor; Justice William O. Douglas, who was then Chairman of the SEC; Jerome Frank, Garland Ferguson, Chairmen of the FTC; Richard Patterson from the Department of Commerce.

I think there is a crying need right now for such a thoroughgoing assessment of our economy.

At the moment we are like the famous seven blind men assembled around an elephant. One grabs the tail and decides the elephant is a rope. Another grabs the trunk and decides the elephant is a snake. Somebody else leans against the elephant's side and decides it's a wall.

As far as the people of our country are concerned today, this is the state of most of the political discussion on our society. I think what we should do is bring together in one place—where attention can be focused upon it—people who have some concepts, and bring together the figures in one very massive investigation. I would like to suggest this investigation be centered on four basic questions:

FOUR BASIC QUESTIONS

First, is it possible that we are developing an economic system in which human beings are surplus to the productive process and in which all but a minority will be useful only as consumers?

Second, is it possible that we must adjust our expectations to a large permanent class of the unemployed?

Third, are the assumptions of individual enterprise as the sparkplug of prosperity tenable in a society today which is tending towards greater centralization? One of my fears, Mr. Chairman, is we can get a revival of "good times" with no revival of employment. We might get good times but still have a lot of people out of work.

Last, it is conceivable that we must look to economic units even larger than the Nation to serve as the backbone of production?

I believe, Mr. Chairman, there is a two-step process necessary here. First, a complete assessment of our society, a discovery of what the genuine problems are, not be content to assume if we had greater efficiency downtown and greater efficiency on the Hill that the solutions would come automatically. I don't believe they will. I think we have to find out what the problem is. I think we have to focus national attention upon it.

Then, after that, I'm perfectly willing—in fact, even eager to discuss whatever political changes may be necessary to do it.

Thank you, Mr. Chairman.

Representative REUSS. Thank you, Mr. Reedy.

Thanks to the whole panel.

[The prepared statement of Mr. Reedy follows:]

PREPARED STATEMENT OF GEORGE E. REEDY

GOVERNMENT AND ECONOMICS

I found your invitation to appear before this committee to be irresistible for the simple reason that these hearings bring together two intellectual disciplines whose relationship has long been misunderstood--government and economics. I do not mean to imply by that statement that either one is in control of the other. But the conviction has been growing in my mind for a number of years that neither can be understood separately. They are both key parts of the interacting processes of our society and to treat them as totally independent forces inevitably leads to mental sterility.

Let me make it clear, in order to avoid useless conversation, that I am neither an economic determinist nor a Marxist. My career as a youthful socialist is far behind me and it took very little observation of the real world to discover that human action has many complex motives besides a desire for individual affluence. Nevertheless, it is through the economic process that we feed and clothe ourselves; foster our families; and care for our physical desires. To ignore the economic motive out of some childish idea that it is nothing but greed is unrealistic indeed.

My approach to this subject, however, is somewhat different than that which was indicated in the letter of invitation I received. I refer specifically to the first assumption which you propose to examine, and I quote: "The first is that our many failings of economic policy stem from failings in our leaders, rather than in the structure of the decision-making apparatus with which they have to work." There is no question whatsoever that this assumption is foremost in the public debate. Actually, I believe it is stated rather often. There is a very strong feeling which I detect in casual conversations over our current plight that good times would come again if we could only resuscitate some of the giants of the past.

For openers, I disagree with the assumption. However, I also disagree with the alternative. I do not believe that economic policy has failed either because of leadership or the "structure of the decision making apparatus". Instead, I believe that our failures can be traced to profound social changes with which we do not know how to cope and until we learn how to handle them, we are just going to have to muddle our way through by main strength and awkwardness. At this moment in history, I am convinced that we will have the same difficulties under any form of governing structure ranging from an absolute dictatorship to a larger form of the New England Town Meeting.

What has happened to us in my judgment is that we have been struck by the unexpectedly rapid growth of a mass society and the even more rapid growth of a technology which has an irresistible tendency to eliminate human beings from the production processes of society. This has been accompanied by a series of world shaking events which have broken down the normal channels of trade and which have established new channels which we have only begun to explore. Finally, there has been a communications revolution which has gone beyond our wildest imaginations in devising efficient methods of storing, retrieving and disseminating information but which, at the same time, has made that information more difficult to digest and use. There are times when I think we are really living in the age of the Tower of Babel.

Under these circumstances, our traditional political--as distinguished from governmental--institutions have languished. It is here that I find the basic difficulties. No government will work well without an accompanying political system and political systems cannot be established by law. They must grow out of the practical experience of the people and they must rest upon the realities of daily life. When life becomes complicated and rests upon premises which are unfamiliar in history, as it does now, then we encounter the stormy social seas through which we are sailing.

The changes have really been profound. For many decades the American political system was a finely tuned instrument which was brought into harmony by political leaders who knew how to reconcile the various economic, ethnic, social and regional groupings in our society. We derided the process with terms such as "horse trading" and "log rolling". But it worked! Not only that, it worked well. It may not have been very aesthetic but it provided our people with reasonable degrees of economic and social satisfaction and whenever it went out of kilter, we were always able to bring it back.

Now, for all sorts of complex reasons, the informal institutions of our society do not have vitality. Ethnic, social and regional ties have lost much of their force--which would be good if we only knew how to cope with the new situation. And there is serious reason to doubt, in my judgment, whether economic activity or even economic prosperity will be the job producer that it used to be. This I will go into further at a later part of my statement.

This is a situation in which I find within myself a great deal of compassion for our political leaders. I believe they are just as good as they have ever been. I am no admirer of the "good old days" and in a long and sometimes harrowing life, I have never been afflicted with a distaste for the present or fear for the future. But I would not at all blame political leaders for nostalgia over the past simply because there was a period when the leaders had followers. It is not like that today. There are plenty of leaders--at times they even seem to be coming out of the woodwork. The problem is that there is a scarcity of followers. Those who sigh for leadership are looking at the wrong end of the equation; what is needed is followership.

This is not the first time this has happened in American history and it is probably not the last. One previous period which is worth noting began in 1848 and ended in 1860. Those were 12 strange years. They came on the heels of some of the most towering figures in the annals of the United States--men such as Clay, Webster, Calhoun, Hart and Benton. Suddenly such names disappeared from the political pantheon to be replaced by a series of politicians and Presidents whose names are known today only to professors of political science and experts in trivia quiz games. Furthermore, one political party--the Whigs--vanished altogether and the great split hit the Democrats. A series of political parties with intriguing names but few followers blazed across the scene--the Know Nothings; the Barn Burners, the Conscience Whigs; the Loco Focos. And it is clear that the men who occupied the White House were there only because the crowd came along while they were standing on the street corner and shoved them into the mansion.

It is customary to blame this situation on the battle over slavery. Actually, however, I believe slavery was only part of a much larger issue. What was really happening was that the nation was going through a profound transition. The Patent Office, which had been issuing very few patents annually, suddenly surged to a couple of thousand a year. Seventeen-thousand miles of railroad track were laid during that decade--a tremendous amount for the times. The Spinning Jenny and Arkwright's Mule were introduced to the United States to serve as the basis for our textile industry and there was a huge expansion of steel production. In short, we are moving from a trading and agricultural society to an economy of factory production. And with it came our first large numbers of non-Anglo-Saxon immigrants--potato famine Irish, such as my ancestors, and German and Hungarian refugees from the unsuccessful revolutions of 1848--to man these factories. All of the created turmoil which was reflected in the paralyzed government of the decade.

To me, it is axiomatic that the effectiveness of any governing form will always reflect the strength of the society. I have dwelt at some length on the 1848-1860 period because it was the most dramatic. But there have been many such periods since then and I believe we are in one now. And I do not believe that governmental structures should be revised until we know what we are going to do after that revision. Let me add that by the word "we" I am not restricting my outlook to the leaders of our society or to its experts. I am referring specifically to our people as a whole.

Gentlemen, the question I wish to pose is this: Do we really know what to do with our society under any form of governmental organization? No doubt there are many individuals--economists, sociologists, political scientists--who could present me with quick answers to that question. But I do not believe we can be satisfied with such quick answers. What we need are answers which have a social consensus riding behind them. And the first answer must be not to how we will change the government but to how we propose to manage our society.

I believe this committee is the ideal pad from which to launch an effort through which we can find the appropriate consensus. In the first place, the jurisdiction of this committee is in the field of economics--and that is where we must begin. In the second place, this is a Joint Congressional Committee which gives it a broad case for sweeping inquiries--and what I propose is sweeping. In the third place, this committee is not loaded down with a heavy docket of specific legislative mandates--which means that it can exercise an imagination that is denied to other committees.

What I would like to propose for your consideration is a revival of the Temporary National Economic Committee which was in full operation under Senator Joseph C. OMahoney when I first came to Washington. I was a very young reporter in those days and my college studies had left me with little more than a feeling that economics deserved the title "the gloomy science". Therefore, I did not grasp the full significance of the TNEC and could not do too much with it at the time as it led to no immediate legislation and as a news story it was competing with the isolationist-interventionist debates that preceded our entry into World War II. It was many years before I understood that it had accomplished two purposes:

1. It provided a complete analysis of our economic system--where it had been; where it was at the time and where it seemed to be going.
2. It provided a focal point for a true public debate which eventually shaped a consensus out of which grew many workable proposals.

That is what I would like to see now--a serious and exhaustive inquiry into the nature of our present economy and what is the direction it is taking. Then--and not until then--we can tackle the question of what must be done politically and governmentally to manage our society.

The scope of what I am proposing can best be outlined by listing the questions which I believe such an inquiry should pose. Allow me to cover them briefly.

1. Is it possible that we are developing an economic system in which human beings are surplus to the productive process and in which all but a minority will be useful only as consumers?

Certainly casual observation affords plenty of evidence to give rise to this chilling thought. The trend to automation is picking up more and more speed and virtually all of the plant expansion with which I have had any direct contact in recent years has meant the introduction of "labor saving devices"--a euphemism to denote the replacement of men and women by robots. In Japan, there is even one plant in which robots make robots and there is little doubt that it will be followed by others.

Many of the studies I have read on this question have assumed that we can rely upon a repetition of past patterns in which the introduction of labor saving devices in the production process has meant an increase in the number of people employed in service industries. The trouble with the studies, however, is that they seem to me to be limited in scope. I am afraid that we cannot come up with a satisfying answer to the question unless it is probed by someone who has the resources that can be put together by this committee--possibly reaching over to the Executive branch of the government for help.

If this is a problem the implications are profound. What if the steps now underway will mean the automation of the service industries upon which so many observers are relying for an answer to our woes? What if the restoration of "good times" will merely mean heightened economic activity without heightened employment? What if the return of "prosperity" will mean jobs for new workers entering the labor market--but not for the old ones who have been displaced?

2. As a concomitant to Question 1, is it possible that we must adjust our expectations to a large, permanent class of the unemployed?

This is a truly haunting question. In the previous paragraphs, I have been dealing with people who had jobs but lost them. How about people who never had jobs in our society in the first place? Are we ever going to bring them into the productive process and, if not, what are we going to do with them?

The "Great Society" administration, of which I was a part, proposed to educate the unemployables and I do not believe that anything was closer to Lyndon Johnson's heart than that project. It is no secret that I have many reservations about my former employer but when it came to the "underdog" I am convinced that his soul was pure. However, I have not seen much evidence of success. And as an educator myself, I have become very doubtful of the ability of education as we now understand it to come through with solutions. Our education facilities are designed to serve a middle-class society and a real revolution is required before they can do anything else. Every bit of imaginative thinking I have encountered on this subject founders on one rock--the fact that many jobs for which people are being trained become obsolete before the training is completed.

3. Are the assumptions of individual enterprise as the spark plug of prosperity tenable in a society which is tending towards ever greater centralization?

Like me, the Chairman of this Committee is a resident of a city where we have seen our productive capacity become increasingly idle as industry after industry has been absorbed by corporate giants and then moved to other parts of the country. The loss of such traditional plants as the Schlitz brewing company has meant more than just unemployment. It has also created in our citizens a sense of loss--a feeling that stability has departed from our society. Furthermore, no one today anticipates help in the form of new industries. The current hope is to persuade some giants from the outside to come to our rescue.

4. Is it conceivable that we must look to economic units even larger than the nation to serve as the backbone of production?

I have a strong feeling that the impulse of American industry to farm out its productive capacity to other nations; to buy its basic materials from other nations; and to make alliances with companies in other nations may have gone beyond reasonable control. It is only necessary to walk down the street to buy some electronic gadget for personal use to take on a feeling of despair.

This is a bitter blow to American steel and automobile workers as well as to our skilled craftsmen in the electrical industry. But what I note is that the most hopeful public sign in Wisconsin industry (I do not pretend to have enough skill to comment on the economics involved) of the past year has been the alliance between American Motors and Renault for production of the Renault in Racine. I cannot help but wonder whether this is a forerunner of something more sweeping.

Blue collar workers are understandably hoping that the government can intervene to prevent the loss of their jobs to foreign competition. Perhaps such intervention is possible. However, I have been in enough foreign countries where American firms are producing goods--Korea, Taiwan, Singapore, Indonesia, Mexico--to wonder whether these goods can be cut off without drastic dislocations. Can our industries afford it?

An authoritative answer is urgently needed.

I have only posed a few questions and I have no doubt that you gentlemen can easily think of others. This is as it should be. I am trying to indicate a direction for inquiry rather than to give you a blueprint. I am also aware of the fact that many individuals have answers to the questions above. But I am unaware of answers on a coordinated basis--answers that will go to the heart of the basic issue: where is our society going?

You may think that I have gone somewhat far afield from the basic scope of your inquiry. I do not believe so. I repeat that the question of how to reorganize our government cannot be answered at this time. Indeed, an answer might be dangerous. I am not at all convinced that a society as uncertain of itself as ours is at this moment can afford to reorganize its top structure. The resulting confusion may be more than we can handle. And certainly, the results will be little different until our people have first established a concensus on what they want us to do.

For some time, I have been attracted by the advantages of a parliamentary system. There is little doubt in my mind that it meets our most pressing problem--a graceful means of effecting a change when a government has lost public confidence. However, I would recommend that you gentlemen take a careful look at what happened to France in 1875 when it moved to the Parliamentary system after the Franco-Prussian war. It took nearly a century for the move to become truly effective. For all those years, it was a standing joke that the Premier's office was equipped with revolving doors so the occupants would not bump into their successors when they were hustled out.

Gentlemen, I believe you have an opportunity to take the first essential step. You have the prestige and the resources to focus nationwide attention on our society--to give us some insight on our economic system and what we must do with it. Some of the answers may be known already--but only to relatively small elites. Those answers--assuming they are valid--are not in the public consciousness at a level where they can really have an impact upon public policy.

To my mind, that is the essential first step--to find out where we are going. Once that step has sunk home, let us then talk about how to get there. The American people must first be shown the goal. They will then be ready to do what is necessary to reach it.

DISCUSSION OF THE TNEC PROPOSAL

Representative REUSS. Let me just start out with Mr. Reedy and his last statement, on the need for some sort of a reborn Temporary National Economic Committee to focus its attention on great economic and social issues of the years ahead.

Are we reaching, or will we reach, the point where capital will provide so many labor-saving devices that we aren't able to employ all those who need and want jobs? And if so, what, if anything, as a social matter, can be done? That, I think, is what you said.

Mr. REEDY. Right.

Representative REUSS. To which suggestion I reacted very positively.

Let me say, first, it's with diffidence that I say this, but the TNEC was the precursor of the Joint Economic Committee.

Mr. REEDY. Of course, it was, sir.

Representative REUSS. History will have to record how well the Joint Economic Committee has done its job since 1946. But I would say you win some, you lose some. It should have done better, but it hasn't done all that bad.

So, I would say that I don't really think that we need a new TNEC. We need a somewhat fortified, more purposeful Joint Economic Committee.

I would think that your focus on the need for an in-depth, across-the-board study, calling on outsiders as well as committee and staff input, on this whole question of where are we going with labor-saving devices and jobs and what are we going to do about it is indeed a worthy subject for our deliberations. And I'm grateful to you for having made it.

And without further ado, I am going to ask the staff—in preparation for our annual report, which is due next March, maybe 4 or 5 months off—to put in time and effort so, in that report, we can have a preliminary go-around of just that issue. We occasionally do specialize on things that are in our report, and this would be a good one. Then, we can see where we go from there, whether we need to perhaps augment the Joint Economic Committee so that it takes on TNEC overtones.

You made a very constructive suggestion. You have earned your witness fee already. [Laughter.]

Mr. REEDY. Mr. Chairman, may I add one thing. My proposal for the TNEC was because I believe this should be massive. What is necessary is to focus the Nation's attention upon this type of an inquiry, and that is one of the things that is missing now.

I know something about the public dialog. You and I both live in a city where the public dialog is on the streets all of the time.

The difficulty now is we need focus, we need national focus.

Representative REUSS. Now, let me turn to a broader question. Mr. Cutler, you have done what I like to see some of you doing, put propositions on the table. You have said that you are not now urging them as the only way to go, but propositions which deserve study.

And I'm delighted that you and Douglas Dillon are embarked upon a 3- or 5-year-long study of whether anything needs to be done and, if so, what.

Mr. **Cutler**. We hope it's going to become one of your major interests, Mr. Chairman, when you return to the role of distinguished former public servant.

ARE CONSTITUTIONAL CHANGES NEEDED?

Representative **Reuss**. Whoever does what you do—puts ideas on the table—is, of course, a moving target.

There happens to sit on either side of you agnostics on the question of Constitutional reform. Mark them down as doubtful.

Mr. Reedy, in effect, says "Look, there are more cosmic social and economic problems that we ought to look at, and until we do that, can we be sure that we really need to have a 6-year presidency?

Mr. Anderson has come forward with a parcel of very constructive proposals that most of them, or all of them, could be done within the present constitutional system. I will later argue with John Anderson that some of them could be done a little better if you were willing to gaze at the Constitution and ask if amendments would help. But let's set that aside. Anderson says you can do most of these things by laws rather than constitutional changes, or even by customary changes.

Let me ask Mr. Reedy and Mr. Anderson, you hold the views that I have just ascribed to you. However, your holding these views does not, I'm sure, induce you to say to Lloyd Cutler and Doug Dillon: "Look, gentlemen, don't embark upon your survey of whether constitutional changes may be needed." I've obviously loaded this question so that you're going to say yes, but I do think I'm not putting words in your mouth.

Mr. **Reedy**. You're absolutely correct, Mr. Chairman. My opposition to the 6-year term—because I was down in Chile just before the Allende election, I don't think anybody who was down there will really be for a 6-year term—but otherwise I have no objection. In fact, I think it good to consider the changes. I just want to know, first, what it is we're going to do after the change.

Representative **Reuss**. Mr. Anderson, please.

Mr. **Anderson**. Mr. Chairman, I'm certainly not disrespectful of the efforts that Mr. Cutler or anyone else would make to entertain possible constitutional changes. On the specific matter of a 6-year term, it seems to me that, in addition to the example cited by Mr. Reedy a few minutes ago, if you needed any cautionary signal about that being a terribly effective device, look at what happened in Mexico when Lopez Portillo—after the election but before the inauguration—of Villas Madrid, his successor, managed to throw the economy of Mexico into even greater confusion by some of the steps that he took, nationalizing the banks and so on, in what were the waning months of his administration. That certainly made me wonder whether or not there is any particular guarantee that a 6-year term is going to invest a President with the kind of wisdom and judgment that we expect or would like to expect.

On the more general question of making changes that will tend to move us in the direction of a parliamentary system, I would direct the chairman's attention to the text of my prepared statement, where I make the charge that, more often than not, parliamentary systems are noted for producing mediocre results, that it took a couple of world wars to elevate Lloyd George and Winston Churchill to the Premiership; and that the norm in Britain during the 20th century were the likes of Bonar Law, Stanley Baldwin, Neville Chamberlain, Clement Attlee, and Alexander Douglas-Home. And I don't think that system necessarily propels into the front ranks of leadership, at least when they are needed, the very best talent.

Representative REUSS. On that, when they had Bonar Law and Stanley Baldwin, we had Calvin Coolidge and Warren Harding.

Mr. ANDERSON. I do concede in my statement that I made this statement despite a few Warren Hardings. We have usually done better. But this is not to deny the chairman's point. We've had some examples of that.

Representative REUSS. Good. I'm glad to have the answers of both Mr. Reedy and Mr. Anderson. I think what we need to do is to go on each doing his own thing. I think it is significant that, just as the reading of the Federalist Papers shows that the Hamiltons, the Madisons, the Jays, had a compendious knowledge of the political institutions of Greece and Rome and the Holy Roman Empire, this morning there could have been put on the table examples, and I think they're constructive, from Chile, Mexico, and Argentina. We've got to look at how other ideas have worked elsewhere.

Mr. CUTLER. Mr. Chairman, could I comment briefly——

Representative REUSS. Incidentally, all witnesses feel free to interrogate each other.

Mr. CUTLER. I wanted to say only that I have no quarrel whatever with Mr. Reedy's proposals for examining the substantive problems of the changing society, nor Mr. Anderson's proposals of nonconstitutional methods of making the Government function, as I think he would concede, more efficiently. Those are perfectly consistent with what we are talking about by way of constitutional reform. Certainly, if any of Mr. Anderson's proposals could be accomplished, they would help a great deal. But I would question the probability that any of those are likely to be accomplished. Some, of course, may be, like the 2-year budget. We have made remarkable progress within this Congress with the entire development of the Congressional Budget Office and the single up or down budget that is now voted each year.

But to illustrate why I think Mr. Reedy's concentration on substantive solutions of world problems is not sufficient, take social security. We are about to receive a report of an excellent Commission on Social Security that includes representatives not only of all the interest groups, but of our best professional economists and our best past administrators of the social security system. It's going to come up with a series of recommendations on a very critical problem: how to accommodate our common desire for a humane, adequate social security system with the management of the economy and the creation of adequate economic growth.

Let us assume that this Commission has as sensible a set of solutions as can be found. Where are we going to form a government that is going to take the responsibility for proposing and carrying through those solutions? I doubt very much whether the Congress you are about to leave or the President of the United States, all of them facing election in 1984—and this problem isn't going to wait until 1984 or much past it—are going to find either the courage to propose a solution or the ability to carry it out in time to do any good. And I will wager you that the solutions they do come up with—and they'll have some patchwork at the last minute—won't fix the problem.

HOW STRUCTURE AFFECTS ECONOMIC POLICIES—THREE EXAMPLES

Representative REUSS. Let me take off from there with a question to all the panel, but I suppose particularly to Mr. Anderson and Mr. Reedy. After all, as I have made clear, this is a hearing of the Joint Economic Committee, and our concern is with jobs, prices, growth, prosperity, and happiness—that's it. That's all you know on Earth and all you need to know, as far as this committee is concerned. So let's look now at forms of government and how they would effect that. At the risk of oversimplification, I see as some of the problems ahead—I'm just going to take a minute or two to outline some economic problems.

How do you reconcile low unemployment and low inflation? That's been a tough one. The Phillips curve has ravaged us over the years. One proposal put forward by people who have seen it work in countries like Austria and Germany is that there should be a social contract, an incomes policy, which says to the wage earner, if you will keep your wage demands within some relationship to productivity increases, we, the Government, in turn will see that prices are also kept stable and that a measure of social justice is done to wage earners as part of the social contract. An incomes policy that works, I believe, is a good thing. It obviates the necessity of having 11 million unemployed in order to keep inflation down. I think that's a good tradeoff.

But the question is, can you really put into effect an incomes policy with the kind of divided, full of checks, frustration-prone Government that we now have?

Another important topic: credit. The Nation, with its needs for new investment, new energy substitutes, new everything is going to need vast resources of credit in the years ahead. Yet, if we ask the Federal Reserve Bank to pump up money and credit, so that there is enough of the good things—investment, progressive agriculture, small business—it turns out that the bad things—merger mania, zany foreign lending, and commodity speculation—all drive up interest rates. And housing, capital investment, small business, and all the rest suffer.

Other countries, typically with parliamentary systems, have adopted credit conservation methods in which the leading banks in the country are called in and, as a patriotic matter, asked to downgrade speculative loans so that they have more to lend for worthy productive purposes. That is something that one lending institution alone can't be asked to do. All have to be patriotic fellows, if any are to be asked.

Well, there again, a Government divided and at dagger points between Congress and the Presidency is not in a very good position to ask that last full measure of devotion from the banks.

Or, to take a third and last case, look at the situation now. We had an election a week ago. Both sides are claiming victory. If the Republicans—and John Anderson was reasonably fair in laying into both parties—if the Republicans live up to their worst instincts, they will create ever greater deficits by buttering up the arms industry on the one hand, and by buttering up fat cats on the other by giving tax bonanzas. And the Democrats, if left to their druthers, will make the deficit grow even worse by yielding to every special interest group, many of them worthy and humanitarian, who also want added spending, coupled with a Democratic penchant for having a war every few years, which adds to the problems.

If we aren't solving the unemployment/inflation riddle, the problem of not being able to unlock where does the money and credit go riddle, and the deficit riddle, isn't there indeed a case for groping for forms of political organization, whether they involve constitutional changes or not, which would make cooperation rather than confrontation more realizable in Government?

Mr. Reedy.

Mr. **Reedy**. Yes, I'd like to respond to that, Mr. Chairman, because you produced examples that could not go to the heart of what I am saying more swiftly. The three things that you have raised—first of all, let's take the question of the incomes policy. The difficulty there is it is based upon assumptions of the past, assumptions that we are going to have a future in which the worker will be tied to the production process, and consequently the production process is going to follow the classic economic patterns in which the worker was to be paid in some relationship to what he could do. Today, when in Japan, we have a factory where robots are manufactured by robots; when in Milwaukee, the garbage collection system has been improved by a new method which reduces the collectors from three to two. When we go all down the line, I think what we have to realize is that most of these things are operated on the basis of assumptions that may not be tenable, and that we had better find out whether the assumptions are tenable.

What we are doing, to a great extent, is yielding to the temptation in the social sciences, the academic social sciences, to build models. When reality does not match the model, to assume something is wrong with reality rather than the model.

What I'm suggesting to you, Mr. Chairman, is that the assumptions of the income policy which has worked so well in Austria in the past may no longer be good assumptions.

Second, on the credit question, the classic assumption is that if credit is available, there will be basic investment; that the investment will produce production, and production will produce jobs. I submit again, that may be a very questionable assumption in the modern world. And if we are not careful, what I am terribly afraid of is that we may get ourselves into the same situation as Uruguay, a country in which I have spent quite a bit of time, a country which did assume that all of the classic assumptions of the past were still viable, a country which had what it regarded as the best of all possible worlds in the 1920's the highest standard of income, the highest wheat consumption, the highest calorie consumption.

What they did was to establish a very elaborate protective system, the most complete cradle-to-grave, and they had a government that was just as efficient as a government can possibly be. And today, when you walk down the streets of Montevideo, you wish someone would take a scrub brush to it. The people walk the streets with clothing patched, patches on the patches. One sees automobiles dating back to the 1930's. It's still the one country in the world where you can still get service on a Model T as a matter of course. That's because they did not recognize the fact that the world has changed so drastically that the assumptions of the past are no longer tenable.

That's what I'm saying here, Mr. Chairman. We cannot assume that the assumptions of the past are tenable.

Representative REUSS. I'm told Mr. Anderson has to leave at noon to catch a plane. We will respect that.

Mr. ANDERSON. Thank you.

Representative REUSS. Let me ask the other two witnesses whether they could stay a little longer.

Mr. REEDY. I have a 3 p.m. plane, Mr. Chairman.

Representative REUSS. I will respect that. If you will answer this question, then I will have one more for you.

LONG-RANGE GOVERNMENT ECONOMIC PLANNING

Mr. ANDERSON. Mr. Chairman, in arguing as I did in the 1980 platform on which I ran that we ought to have an incomes policy, I was not arguing that we ought to have an Austrian or a West German model for that incomes policy.

I quite agree that the problems of the American economy are quite unique and quite different from either of those countries—and particularly as we look to the future—but I think the question has to be addressed this way: If you don't have an incomes policy, then what do you have to try to restrain inflationary forces within the economy?

Albert Sommers, chief economist of the Conference Board, sent me an article which he had written not long ago, in which he said that leaving the entire job of fighting inflation to the Federal Reserve Board is like using nuclear warfare to settle our border dispute.

It seems to me that that is what has happened, and I would be very critical of any administration, like the present administration, that doesn't even want standby authority in the event of an energy crisis.

As you may recall, the current occupant of the Oval Office refused legislation that would have given him in the event of another 1973-type energy crisis the authority to allocate scared supplies of gasoline, oil, and other fuels.

It seems to me to reject out of hand the idea that we ought to plan for another recession is to ignore the fact that we have now had eight postwar recessions and they have been coming quicker and quicker. We had one briefly in 1980, then the most recent recession that began in July 1981 and continues even to this day.

All I'm arguing for is that we have the kind of decisionmaking machinery within the Federal Government that can begin to plan for the kind of countercyclical efforts that I think the Government ought to be making so that we don't have situations like the Senate coming back—as I just read this morning—and suddenly proposing a public works program, perhaps to create 200,000 jobs, and then sit around and wonder where's the money going to come from.

Is there going to be a new gasoline tax? Are we going to put another 50 cents a barrel on distilled spirits? Where are we going to come up with the revenue?

I think all of that could be avoided if we would recognize that under a capitalist system like ours these economic emergencies are going to take place from time to time and they will recur despite our best efforts to prevent them. We ought to have legislation on the books, as I said earlier, giving the President additional flexibility as far as taxing power is concerned, giving the Congress the ability to structure the kind of countercyclical public works program that would be helpful in putting people back to work.

Because if we don't, if we don't acknowledge the need for economic planning of that kind, then we resort to the kind of ad hockery that so often is not on the leading edge of economic events but is simply trailing what has already taken place.

CAMPAIGN SPENDING—SHOULD THERE BE LIMITS?

Representative **Reuss**. Mr. Anderson, let's turn to the issue of campaign expenditures, which you have alluded to in your statement. Certainly, the Nation is upset about the fact that in this last campaign—and increasingly in recent campaigns—huge sums have been spent on running for congressional seats for which the salary is $60,000 a year for 2 years, a total of something like $300 million spent in the campaigns we've just been through. It does look as if millionaires who can spend without limit on their own campaigns, or human slot machines who will accept anything the hundreds of political action committees give them, are the kinds of people who will have an advantage over others in congressional and senatorial elections in the future.

Certainly, that is not good for the Republic. Some have suggested, like Common Cause, public financing of congressional elections, and I voted for that, but quite honestly I have some difficulty in the public purse's being asked to match the $300 million that private people have been able to spend.

That seems to be exorbitant. So why not put an overall limitation that could be spent on campaigns?

It should be high, one-half a million for a congressional seat, several million for a senatorial seat—whatever.

But one is immediately confronted with the fact of that in *Buckley* v. *Valeo,* 1976, the Supreme Court said that the freedom of speech commandment of the Constitution prevents enforcing any limitation on what can be spent in a campaign, even by the candidate himself or by the totality of the political action committees.

Mr. **Anderson**. Independent committees.

Representative REUSS. Independent committees, yes.

My question is—and I will ask you, then I'll ask the other members of the panel—Is it not possible that the Supreme Court erred, as it did in the *Dred Scott* case, and wouldn't it be something much to be wished if either the Supreme Court shortly distinguished itself—which is a great way of proceeding, they did that in the apportionment cases—or overruled itself, which you can also do; or if need be, a constitutional amendment were put on the books making it possible for the legislative to set some definite limit on the totality that may be spent?

Would you answer that first?

Mr. ANDERSON. Mr. Chairman, I quite agree with what I believe the Chairman has just indicated, that our reverence for stare decisis should not cause us forever to be wedded to the principle in *Buckley* v. *Valeo* that independent expenditures are not subject to limitation, because there are too many very, very cogent examples of where expenditures of that kind were used to the great damage of the political process, not only in the election that just passed but others.

My reading of *Buckley* v. *Valeo* is that if you have public financing, however, you can legitimately impose ceilings on expenditures by candidates who accept that public financing.

Adding to what the Chairman has said, I don't believe we have to tolerate the kind of excesses that went on in this most recent mid-term election where, depending on whose figures you used, at least $300 million was expended in congressional campaigns, and this is not counting the additional millions of dollars that were spent in some of those very expensive gubernatorial campaigns. Or in one case, $1½ million being spent by a candidate in an assembly district in one of our States.

So I think the time has clearly come to call a halt to excessive expenditures. I think you can do it if you enact a form of public financing where you are not simply putting so much money out on the stump for a candidate to run with.

When you opt for public financing, you can, I think, enact reasonable restrictions, reasonable criteria, that require that candidate to raise a threshold amount of money to indicate that he is a serious and credible candidate.

Then, as I have indicated, if you go to the use of matching funds in the primary process and match small contributions with money from the Federal checkoff fund, which has been in existence since the late 1969's, I think it would be possible to drive out of the system the special interest money from PAC's, and I think that certainly would be a historic political process.

But I want to reiterate, I don't think you have to accept unlimited expenditures simply because you go to public financing. I think we ought to do something to control what has become almost a national scandal in the amounts that are being expended to win public office.

This is certainly turning off the public, when you have only 39 percent, I believe, of the eligible voters participating in this most recent election. That was only marginally better than what has occurred in two midterm elections prior to that.

So obviously all of that money didn't serve to encourage people to vote. It didn't serve in most cases I think to even educate them on the basic issues of the campaign. It tended to bring out the kind of meanness and the kind of bitterness that was all too typical of the tactics of those who expended these vast amounts of money.

I think it represents a real danger to the political process.

Thank you, Mr. Chairman.

Representative **Reuss**. So you would join me in the hope that the Supreme Court would seek to distinguish Buckley *vs.* Valeo; second, seek to overrule it; third, if it refuses to overrule it, that there should be a constitutional amendment which says the Congress can impose reasonable overall limitations?

Mr. **Anderson**. I would indeed.

Representative **Reuss**. Thank you, Mr. Anderson.

Mr. Cutler, will you speak to this particular one? I will ask you the same question.

Mr. **Cutler**. I argued Buckley against Valeo along with Archibald Cox in support of the constitutionality of the expenditure limitations and of the other provisions of the statute. We did prevail in the court of appeals here, but we did not prevail on the expenditure limitations, as you said, in the Supreme Court.

I doubt that this Supreme Court, as it is likely to evolve, is going to change that position. But I do think there are two ways, short of constitutional amendment, in which Congress could return to the fray and solve the problem.

One is, as suggested by Congressman Anderson, the Supreme Court did uphold the provision of the Presidential campaign fund chapter under which Presidential candidates have the option of taking—I think in the last election it was $30-odd million from the Federal Government, and foregoing contributions of their own and limiting their expenditures to the Federal amount. That same provision could be adapted for Members of Congress, and as you know, there have been several bills to do that.

I don't know your view, but the view of many reform-minded Members of Congress greatly concerned about this problem is that they cannot see, for the life of themselves, why if there is to be Federal money made available for the campaign, their opponent should have the same amount that they would.

So, I doubt that we are going to see that solution in the very near future, although the sentiment in favor of it I think is rising.

The other solution would be—I think it would take a statute to do it, since I doubt that the FCC would do it by itself—to require that whenever a radio or television station accepts a political advertisement from a Federal primary or election candidate, that it must carry free, if necessary, an equal amount—offer an equal amount of time for commercials or personal appearances to the opposing candidate of the other major party.

The problem up to now has always been that the equal time rule has not been construed to apply to paid political advertisements, and beyond that when you do apply it you must apply it to all the minor parties as well.

In *Buckley,* the Court upheld a system in which for this Presidential campaign fund what was made available for minor parties was a proportion based either on the number of votes achieved by that party or that candidate in the preceding election or some recompense after the election, as Mr. Anderson was able to obtain. As you know, he will be the beneficiary of some $5 million of Federal campaign funds which he got after the 1980 election, based on his showing in that election.

You might be able to provide that television stations and radio stations must give time to all of the other candidates, but that it would be equal time only for the other major party candidates and a proportional time for the smaller party candidates.

Since most of this money goes into television advertising, that would cover a very large part of the problem, and the Court, I believe would sustain that.

Representative REUSS. I have a little difficulty with that, frankly. If you are going to lay it on the radio and television industry to make up for a wrong-headed Supreme Court decision, why not lay it on the Bumper Strip Co. or Charlie's Billboard Co. or, for that matter, the print media, the newspapers.

Of course, you have got a toehold on radio and television, but if you want to exercise that toehold why not do it across the board and say they have to pay for their use of public airwaves.

It seems to me a little mingy to get them to overcome a Supreme Court opinion.

Mr. CUTLER. One effect that might have is to reduce the number of paid ads that radio and television stations are going to accept.

Representative REUSS. Mr. Reedy, what about this proposition we are discussing?

Mr. REEDY. First of all, in terms of *Buckley* v. *Valeo,* I read that decision rather carefully. It strikes me as the sort of thing that would be reinterpreted down the line. The Supreme Court rarely reverses itself, but it also tends to reinterpret things.

To address the general proposition, Mr. Chairman, first of all, the amount of money involved here does not bother me. I have a feeling within a few years you will be speaking of the 1982 campaign as being a model of modesty and of quiet spending because everything that I see in the campaign process indicates to me that the costs of campaigning are going to continue to soar.

The reason they are continuing to soar is that we are in the age of overkill. I doubt whether a dollar spent in a campaign today is as effective as spent in a campaign some 20 or 30 years ago, but that is irrelevant. We are in the age of overkill, and nobody dares underkill if somebody else is overkilling.

But the thing that I believe is a much better approach, while I am not concerned about the amounts, I am concerned about the sources of the money, I think that what is dangerous here is not that a lot of money is spent but that the money is contributed in a disproportionate manner and also that the people are in a position where they cannot follow through on who is contributing the money and why.

A number of years ago there was a law in Texas—I am not sure whether it is still on the books or not—a law in Texas whereby there was no limit whatsoever on campaign spending, but there was very strict accountability as to who was doing it. All of the money had to pass through the hands either of the candidate himself or of his campaign manager or of a treasurer set up for that purpose, and the law specified that no money could be spent in any other way. It had to go through the hands, and there was periodic reporting.

Now, the law was imperfect. I don't want to give you an indication it was a perfect law. And in my judgment—I have been in some Texas campaigns—and in my judgment of "truly effective," a number of imperfections had to be backed up. But I like the basic philosophy of it. I think if there was some way we could centralize both the collection of the funds and the spending of the funds and at the same time provide a very rapid reporting so the public would know exactly who was putting money into it, into the campaign, and how it was being spent and what it was being spent for, that is what I would like to see.

In the modern age I believe there should be some way of doing it.

Representative REUSS. To conclude on this subject, would both of you agree that the constitutional right of freedom of speech, while sacred, is not absolute and that the State may, for example, validly enjoin the shouting of "fire" in a crowded theater, Mr. Cutler?

Mr. CUTLER. Certainly, sir. You might wish to make part of the record the articles that both Judge Harold Leventhal and, more recently, Judge Skelly Wright have written in the Columbia Law Review on this precise topic, whether they were right or whether the Supreme Court was right in *Buckley*.

I will submit those to you.

Representative REUSS. I will ask that those articles—and I am familiar with Judge Wright's article—be introduced at this point in the record.

[The two Columbia Law Review articles follow:]

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COURTS AND POLITICAL THICKETS*

HAROLD LEVENTHAL**

This Article presents some reflections on the role of the courts in considering controversies over the application and validity of statutes regulating the political process.

Restructuring of the political process has been and bids fair to continue to be a national concern. Disclosures of activities in connection with the 1972 campaign, subsumed under the rubric of Watergate, led to the Federal Election Campaign Act Amendments of 1974,[1] modifying the Federal Election Campaign Act of 1971.[2] This statutory framework presented work for the courts, dramatically evidenced by the months devoted to that work during 1975, first by the United States Court of Appeals for the District of Columbia Circuit (en banc), and then by the Supreme Court. In due time, the litigation styled *Buckley v. Valeo* resulted in the Supreme Court's landmark decision.[3]

By differing split votes, the Supreme Court upheld provisions governing political contributions: disclosure of those exceeding $100 per campaign, and ceilings of $1,000 per campaign. The Court invalidated maximums on campaign spending, except for Presidential nominees who accepted the public financing that was separately upheld.[4]

This Article doubtless bears the impress of its having been fashioned as one of the Sulzbacher Lectures, delivered during the 1976 campaign due to the near-astrologic conjunction of the phases of the court and academic calendars. But the reflections and perceptions began shaping in 1975, largely as a result of the calendaring at that time of the *Buckley* litigation. The pressure cooking of multiple issues compressed for decision in a few months of effort[5] was accompanied in the District of Columbia Circuit by an en banc argument and decision rejecting the effort of the Ripon Society to require the 1976 Republican convention to abandon "bonus" votes.[6] More of these issues later.

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* © Copyright 1977, Harold Leventhal. This Article is an outgrowth of the Sulzbacher lecture of the same name delivered at the Columbia Law School on October 12, 1976.

** United States Circuit Judge, District of Columbia Circuit.

I should like to express my appreciation to Samuel Estreicher and Charles G. Cole for their suggestions and assistance.

[1] Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 47 U.S.C. (1977)).

[2] Pub. L. No. 92-225, 86 Stat. 3 (1972).

[3] 424 U.S. 1 (1976).

[4] In addition, the Court unanimously invalidated congressional selection of members of the Federal Election Commission authorized to implement that Act. This led to a restructuring of that Commission, in the course of which certain provocative substantive additions to the Act were made as well. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified in scattered sections of 2, 47 U.S.C. (1977)). Provocative additions include a requirement that membership organizations report "the costs . . . directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate," 2 U.S.C. § 431(f)(4)(C) (1977), and a provision specifying a higher limit on contributions to national political committees than to other political committees, 2 U.S.C. § 441a(a)(1) (1977).

This commentary is not merely the voice of Clio, the bittersweet of history, on decisions done and over with. The underlying problems are of national concern, and the concern is not partisan. There will be new issues, new problems, new proposals, concerned with the framework for improvement of the political process. The concern with process, the clash of reform and rights, will mean, in all likelihood, more cases for the courts.

The imagery of "political thicket" is well suited to my reflections, though I do not employ the term to prompt total judicial abstinence, as did Justice Frankfurter.[7] He was fully aware and approving of the established role of courts in vindicating the right to vote, to a fair count of votes cast, and to laws prohibiting the corruption of elections. But he rejected the idea of entertaining a lawsuit that challenged election districts established by the legislature as inequitable in the light of population distribution. To do this, he said, was to entertain a complex question governed by many political considerations, without judicially manageable standards, and thus to enter a political thicket. He lost the decision in *Baker v. Carr,*[8] which launched the reapportionment doctrine under the banner of one man, one vote. But he coined a memorable metaphor. For me the "thicket" sign does not mean out of bounds, but a caution to walk carefully in the work of interpreting and determining the validity of the legislature's efforts to structure the political process.

To avoid any possible misunderstanding, I am not addressing the different, if related, doctrine that some constitutional questions are "political questions" that are non-justiciable in the federal courts. That doctrine has a respectable lineage and domain, and has been prominent ever since 1849, when *Luther v. Borden*[9] held that it was for Congress, not the Court, to consider whether areas with a population influx in Rhode Island were entitled to set up a competing government to provide an increase in voting strength, and to obtain recognition under the constitutional guarantee of a republican form of government in the states.

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[5] There were some 28 issues and constitutional sub-issues certified by the district court. The action was filed on Jan. 2, 1975, argued before the court of appeals on June 13, 1975, and decided by Aug. 15, 1975.

[6] Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

[7] *See* Colegrove v. Green, 328 U.S. 549, 556 (1946).

[8] 369 U.S. 186 (1962).

[9] 48 U.S. (7 How.) 1 (1849).

The "political question" domain is respectable, but not spacious. There are rulings of abstinence on this ground.[10] But they loom more conspicuous because they are thrust as occasional peaks in a flat meadow.

Complete judicial abstention put to one side, attention is fairly focused on process: on the judicial process for reviewing the legislative process for regulation of the political process. The same constitutional questions may re-emerge, probably in modified form; new constitutional questions will arise; statutory questions will abound, and many of these will have a constitutional aura. In attempting to discern the outlines of a judicial approach combining vitality and endurance, I begin with an examination of how the Supreme Court has handled two classes of cases—the reapportionment cases and the ballot access cases.

I. THE REAPPORTIONMENT CASES

Baker v. Carr[11] put reapportionment on the Court's platter in 1962. Tennessee's constitution provided for state-wide numerical equality of representation, but for sixty years the legislature had defeated all measures for reapportionment. The state had no popular initiative. The relative standings of counties changed radically in terms of qualified voters. The product: thirty-seven percent of the voters elected twenty of thirty-three senators; forty percent of the voters elected sixty-three of ninety-nine members of the House.[12] There resulted, in Justice Clark's homespun phrases, a "crazy quilt" picture that was "topsy-turvical of gigantic proportions."[13]

Justice Brennan's majority opinion held justiciable the complaint of voters that they had been denied the equal protection of the laws. The Court rejected Justice Frankfurter's "political thicket" contention: that the Court would not be able to formulate standards of apportionment which would take into account numerous relevant social, economic, and political factors.[14] It also brushed aside his emphasis on the role of public vigilance in correcting deficiencies in the political process, and his warning of the pernicious effect of judicial intervention in the politics of a democratic society.[15]

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[10] *E.g.*, Coleman v. Miller, 307 U.S. 433 (1939) (questions concerning validity of state ratifications of Child Labor Amendment were to be determined by Congress); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (question whether provision for legislative "initiative" in Oregon constitution violated "Guarantee Clause" is to be determined by political branches).

My opinion in United States v. American Tel. & Tel. Co., 551 F.2d 384 (D.C. Cir. 1976), raised, but bypassed, the issue of justiciability of the dispute between the President (who declined, on grounds of secrecy, to identify persons wiretapped without a warrant for national security purposes) and the House of Representatives (which sought to verify his assertion of national security in order to carry on legislative functions). The court remanded to the trial judge to ascertain whether the parties could come to an agreement, which might involve the use of the trial judge in a narrow role, to conduct the verification in camera.

[11] 369 U.S. 186 (1962).

[12] *Id.* at 253 (Clark, J., concurring).

[13] *Id.* at 254.

[14] *Id.* at 323 (Frankfurter, J., dissenting).

Justice Clark clinched the day: "I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee."[16] Quoting Justice Frankfurter's rhetoric about the value of an "informed, civically militant electorate," Justice Clark observed that the extreme distortions in the Tennessee districting plan had prevented the state's "aroused popular conscience" from initiating any reforms. The people were "caught up in a legislative strait jacket."[17] Judicial intervention was necessary.

How was it, I have wondered, that in Britain political leaders like the Conservative Disraeli proposed the 1867 reform legislation? Was Justice Frankfurter right, that a system where the courts intervene undercuts such leadership? I found that the important logjam was broken in England in the earlier Reform Act of 1832, after the people's demands unseated hero Wellington as prime minister, and after Lord Grey persuaded the King to send word to Wellington that he would pack the House of Lords if they continued to resist reform.[18]

What England accomplished by a packing threat in the 1830's was done in the 1960's by a Court that had twenty-five years earlier averted another packing threat.

Enough of British constitutional history. For the United States, the Supreme Court acted when political corrective processes were forestalled. As Justice Stone's *Carolene Products* opinion points out, the courts rightly provide more exacting scrutiny when legislation restricts the basic corrective political processes that a democracy relies on for removal of undesirable laws.[19]

If the Court was right in rejecting the rigidity of Justice Frankfurter, how did it cope with the problem of standards? Initially, with sensitivity to the complexity of the problems. In the 1964 decision of *Reynolds v. Sims*,[20] Chief Justice Warren recognized that mathematical exactness was neither wise nor feasible.[21] While population was to be the "controlling consideration," legitimate state objectives, such as the need to maintain the integrity of political subdivisions, might justify some deviation.[22] Reapportionment need not be done every year or two.[23] Quoting Justice Holmes, " '[w]e must remember that the machinery of government would not work if it were not allowed a little play in its joints.' "[24]

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[15] *Id.* at 270. *See also* Colegrove v. Green, 328 U.S. 549, 553-54, 556 (1946).
[16] 369 U.S. at 258 (Clark, J., concurring).
[17] *Id.* at 259.
[18] *See generally* E. Halevy, The Triumph of Reform 57-59 (2d ed. 1950).
[19] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
[20] 377 U.S. 533 (1964).
[21] *Id.* at 577.
[22] *Id.* at 580-81.
[23] *Id.* at 583-84.

The Chief Justice's pragmatic approach to reapportionment made good sense. As he observed, "[i]ndiscriminate districting, without any regard for political subdivision or natural or historic boundary lines, may be little more than an open invitation to partisan gerrymandering."[25] Mathematical exactness was unattainable—since census data were collected only at ten year intervals—and insistence on such an equality approach, leaving no room for the give and take of the political process, would make it impossible for state legislatures to reach political solutions to the reapportionment problem, necessitating further intervention by the courts.

There was no abdication to political processes. On the same day as *Reynolds*, *Lucas v. Colorado General Assembly*[26] held invalid a plan adopted by the people in a recent election because it required only the House to be apportioned on population, the people expressly rejecting a plan for both houses to be apportioned on population. The district court had upheld this on the ground that the presence of the initiative permitted the people to act. "If they become dissatisfied with what they have done, a workable method of change is available."[27] Chief Justice Warren rejected this approach, saying that while the existence of a nonjudicial, political remedy may justify a court in staying its hand temporarily, a popular referendum cannot justify denial of constitutional rights.[28]

As noted, Warren's definition of constitutional rights allowed for play in the joints. Unfortunately, subsequent Supreme Court opinions did not pause for Warren's cautions. They gathered momentum from his slogans—from such phrases as "one man, one vote" and "legislators represent people, not trees." The Court pressed for mathematical equality, reaching its peak of intensity with two 1969 decisions on congressional districting. It struck down apportionment plans although the maximum deviation from perfect equality was only seven percent in *Wells v. Rockefeller*[29] and only three percent in *Kirkpatrick v. Preisler*.[30] The Court insisted on "[e]qual representation for equal numbers of people," as "a principle designed to prevent debasement of voting power" without tolerance of "even small deviations."[31] There must be "a good-faith effort to achieve absolute equality" or justification for the variance.[32]

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[24] *Id*. at 577 n.57 (quoting Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931) (Holmes, J.)).

[25] *Id*. at 578-79.

[26] 377 U.S. 713 (1964).

[27] Lisco v. Love, 219 F. Supp. 922, 933 (D. Colo. 1963).

[28] 377 U.S. at 736. Of course, if the political process available is only the holding of a constitutional convention which is subject to discrimination in the apportionment of convention delegates, it lacks the self-corrective element. *See* WMCA, Inc. v. Lomenzo, 377 U.S. 633, 651-53 (1964).

[29] 394 U.S. 542 (1969).

[30] 394 U.S. 526 (1969).

The justifications that were offered were rigidly rejected. Missouri's plea for the leeway of legislative compromise was dismissed as "partisan politics."[33] Variances to avoid the fragmentation of distinct social groups were held impermissible.[34]

One consideration that does support an absolute judicial rule is that it refutes the argument that there can be no manageable standard. Justice Frankfurter refrained from apportionment because he thought it would pull the Court into political controversies. A rigid rule is blind to any distractions. This is fine insofar as it yields disregard of "partisan politics." But it is mischievous if it insists on abstraction without regard to the history and objectives of government organization, and without regard to feasibility.

The Court's single-minded devotion to absolute population equality in congressional districting was an impossible quest. As the Court later recognized, census figures underestimate the U.S. population by 2.5% and may underestimate particular minority groups by as much as 7%.[35]

The first wave of reapportionment cases found population variances as great as twenty to one, which obviously debased effective representation in the legislature.[36] However, once district populations are roughly equal, the individual voter is much more concerned with how district lines fragment or concentrate his interest groups than by differences in district size.[37] These, however, were not pertinent under the Court's standard.[38]

In the *Midland County*[39] case the Court extended its doctrine to local governmental units with general powers of government, even though this meant that city dwellers would dominate a board whose real work was building county roads.[40] The climax, for me, came with *Hadley v. Junior College District*[41] in 1970. To facilitate local establishment of higher education facilities, a Missouri statute provided that local school districts could combine to form a jointly controlled junior college district. The law permitted a large district like Kansas City to receive slightly less representation on the joint board of trustees than its population percentage. This guaranteed that a small school district participating in a joint board would not find itself swallowed up by its larger partner. Despite the specialized purpose of the board, the rational basis for its allocation of trusteeships, and the voluntary participation by the member school districts, the Court held the plan unconstitutional. The Court's opinion seemed to nullify such a compromise even if freely negotiated.[42]

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[31] *Id.* at 531.

[32] *Id.*

[33] *Id.* at 533.

[34] *Id.*

[35] Gaffney v. Cummings, 412 U.S. 735, 745 n.10 (1973). *See generally* NATIONAL ACADEMY OF SCIENCES, AMERICA'S UNCOUNTED PEOPLE (1972).

[36] Dixon, *The Warren Court Crusade for the Holy Grail of "One Man-One Vote,"* 1969 SUP. CT. REV. 219, 237.

[37] *See, e.g.*, United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512 (2d Cir. 1974), *aff'd sub nom.* United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

[38] *See* Kirkpatrick v. Preisler, 394 U.S. 526, 533 (1969).

[39] Avery v. Midland County, 390 U.S. 474 (1968).

[40] *Id.* at 502-09 (Fortas, J., dissenting).

[41] 397 U.S. 50 (1970).

This rigidity troubled me particularly because I visualized the need for a compromise approach if ever the problems of core cities were to be solved by consolidation with surrounding areas. Wealthier suburbs would not be willing to join with the needy and densely populated cities in metropolitan councils if representation were determined entirely by population. The Court's holding in *Hadley* seemed to preclude even compromises similar to that by which the smaller states were included in the federal union.[43] And the Court was now in areas where corrective political processes had not been shown to be awry, where there was voluntary choice by the localities, and where state legislatures were based on districts of substantially equal population.

Justice Marshall's 1971 opinion in *Abate v. Mundt*[44] was felicitously styled for it did abate the prior rigidity. The Rockland County Board had long consisted of supervisors of its five towns. A new plan established a county legislature elected from five districts, drawn along town lines. Because the smallest district had one representative, and the others were rounded, one district was underrepresented by seven percent. With two dissents, the Court permitted town lines to be maintained, taking account of the long tradition, and finding no "built-in bias favoring particular political interests or geographic areas." The Court eschewed mathematical exactness, and recognized the need for flexibility in local government.[45]

The changes in the Court's rulings were due in part to changes in membership, symbolized by Justice Rehnquist's 1973 opinion permitting the Virginia Senate to retain lines of historic subdivisions even though a sixteen percent variation resulted.[46] In part there was a change in temper, reflected in the concurrence of Justice White, who had earlier voted with the majority in *Hadley* and other local government decisions. Justice White distilled the Court's experience in his 1973 opinion in *Gaffney v. Cum-*

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[42] *See id.* at 65 (Harlan, J., dissenting).

[43] *See generally* Reynolds v. Sims, 377 U.S. 533, 574 (1964).

[44] 403 U.S. 182 (1971).

[45] The vitality of *Abate* is attested by Town of Lockport v. Citizens for Community Action at the Local Level, Inc., 430 U.S. 259 (1977), with its recognition of an important interest in structuring local government so as to respond to local needs. In *Lockport*, the Court upheld against an equal protection challenge a New York constitutional provision and law which required that any transfer of the functions of county government be approved by concurrent majorities of city and noncity voters. The Court reasoned that city and noncity voters had different interests in the structure of local government, and that New York could permissibly recognize "the realities of these substantially differing electoral interests." *Id.* at 272. The Court also noted, before approving the New York scheme, that "The constitutional and statutory provisions in this case . . . do not appear to be the sustained product of either an entrenched minority or a willful majority." *Id.* at 272 n.18.

[46] Mahan v. Howell, 410 U.S. 315 (1973).

mings,[47] upholding a plan of the Connecticut legislature that contained an eight percent deviation and was rejected by the district court as partisan structuring. He acknowledged the practical problems which had doomed precise mathematical equality: imperfections in census data, the population mobility, and the disparity between population and eligible voters.[48]

Justice White reiterated that fair and effective representation did not depend solely upon mathematical equality, but on a variety of considerations.[49] He found acceptable the "political fairness principle" designed by Connecticut legislators to give the two major parties representation roughly proportional to their strengths in the state population. The Court would not attempt "the impossible task of extirpating politics from what are essentially political processes of the sovereign States."[50] "[T]he apportionment task," he wrote, "dealing as it must with fundamental 'choices about the nature of representation,' . . . is primarily a political and legislative process."[51] Minor deviations from census equality would not justify judicial interference:

> That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.[52]

We have not seen the end of the reapportionment cases.[53] The Court has entered the thicket. Where there is racial tinkering the Court is still involved.[54] It has ended the stranglehold of egregious misrepresentation. But its effort to proceed judicially through rigidity has receded. It has achieved an approximation of equality of population far in advance of the deviations of twenty-five percent tolerated in England. Its effort may have limited but not precluded the political processes. Whether a blatant gerrymander not justified by approximate fairness would prevail is a matter for the future. There has in the net been a pragmatic approach that has shown some deference to the political system. The result is an improvement in the political structure and a fine subject for a course in judicial political science.

The Court's experience with reapportionment warns that the one person-one vote principle should be extended only cautiously, and with some flexibility, to new areas of political activity. The value of such a pragmatic approach, and of deference to the corrective possibilities of the political process, is well demonstrated by the decisions in *Ripon Society v. National Republican Party.*[55] In that case, the Ripon Society, a group of liberal Republicans, used the one man-one vote principle to attack the Republican Party's formula for apportionment of delegates at its 1976 national convention. Delegates were allocated to a state in part on its electoral vote weight, and in part on the strength of the Republican Party vote in the last general election (the "victory bonus").[56] The District of Columbia Circuit's en banc opinion is best appreciated by contrasting it with the opinion by the panel that was superseded. The panel insisted that the national parties were engaged in governmental action, especially in the light of current provision for public financing, and that all governmental units were to some extent governed by equal protection standards. Applying these standards, the panel invalidated the victory bonus system. Judge McGowan, writing for the en banc court, assumed for argument that there was "state action" governed by equal protection requirements.[57] The court held, however, that the strict one man-one vote standard was not an appropriate test for delegates to a national political convention.[58] A party is "more than a forum for all its adherents' views. It is an organized attempt to see the most important of those views put into practice through control of the levers of government."[59] One party might choose strict democratic majoritarianism. Another may give the proven party professional a greater voice than the newcomer.

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[47] 412 U.S. 735 (1973).

[48] *Id.* at 745-48.

[49] *Id.* at 748-49.

[50] *Id.* at 754.

[51] *Id.* at 749 (quoting Burns v. Richardson, 384 U.S. 73, 92 (1966)).

[52] *Id.* at 749-50.

[53] On May 31, 1977, the Supreme Court issued Connor v. Finch, 97 S. Ct. 1828 (1977), which emphasized that a districting plan fashioned by a court will be held to higher standards of equality, and less permissible deviation, than a plan constructed by a legislature. The approach of according recognition to a legislature's judgment on such matters as historic political boundaries, rather than equalization of numbers *simpliciter*, is a sound application of the pragmatic approach.

[54] *See generally* United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

These choices deserve respect, for there is an interest of constitutional dimension in allowing political parties to structure and govern themselves. First amendment rights of speech and assembly "are after all not ends in themselves but means to effect change through the political process."[60] There is a corresponding "right not only to form political associations but to organize and direct them in the way that will make them most effective."[61]

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[55] 525 F.2d 548 (D.C. Cir. 1975), *superseded by* 525 F.2d 567 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976).

[56] Most of the delegates (72%) were to be allocated on the basis of the states' electoral college votes, but a significant segment (14%) was to be allocated on the basis of electoral college delegation only to states voting for the Republican nominee in the last presidential election, and another segment (11%) was to be divided equally among states which voted Republican at the last election. *See* Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567, 570-71 (D.C. Cir. 1975) (en banc). The Ripon Society contended that the delegation for each state should be proportional either to the state's entire population, or to that part of it that voted Republican in the last election. *Id.* at 578. It argued that the victory bonus system described above tended to minimize the representation of significant Republican minorities in many states.

[57] *See id.* at 576, 578.

[58] *See id.* at 580.

[59] *Id.* at 585.

[60] *Id.*

[61] *Id.*

The protesting Republicans were relegated to political action. Theoretically, dissatisfied members were free to start their own party. But more importantly, the court said, the two major parties are engaged in intense competition with each other in a general election.[62] In the absence of a one-party state, or racial discrimination, the courts were not called on to restructure the political parties, because the political process itself provided opportunities for correction.

Subsequent political events hint at the wisdom of the court's approach. The victory bonus allocation system at issue in *Ripon* was created in 1972 by southern conservatives who felt that they would benefit from the Republican Party's domination of the south.[63] This formula did not have an appreciable effect on the 1976 convention, because of Nixon's nationwide victory in 1972. But Jimmy Carter's sweep of the south in the 1976 election means that the southern states will come to the 1980 convention with greatly reduced delegations, unless the system is changed. Thus at least one commentator has praised the court's restraint, and suggested that reform may come from within the chastened party.[64]

II. THE BALLOT ACCESS CASES

While the reapportionment cases provide a paradigm of judicial action in a political sphere, they are not unique. The same pattern can be seen in the cases on ballot access for independent candidates or nonestablished parties.

Judicial intervention began in 1968 with *Williams v. Rhodes.*[65] The Supreme Court invalidated an "entangling web" of Ohio laws regulating access to the ballot. Judicial intervention was clearly appropriate, for the Ohio scheme, which required the filing by February of petitions signed by fifteen percent of the voters at the previous gubernatorial election, made it virtually impossible for an independent candidate for president to get on the ballot.[66] The scheme in its "totality" was held to be invidious discrimination that impermissibly burdened the rights to vote and political association.[67]

Because the election was imminent, the opinion issued seven days after argument, less than two months after the decision below. Among the dissenters was Chief Justice Warren. He objected to the lack of unhurried deliberation,[68] and pointed out that the eve of election mandate requiring

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[62] *Id.* at 586.

[63] Lou Cannon, political editor and commentator for the Washington Post, attributes the establishment of the victory bonus system in 1972 to Clarke Reed, then the Mississippi GOP chairman. Cannon, *The GOP's Calculus*, Washington Post, Jan. 4, 1977, at A13, col. 5.

[64] *Id.*

[65] 393 U.S. 23 (1968).

[66] *Id.* at 25.

[67] *Id.* at 34.

[68] *Id.* at 63 (Warren, C.J., dissenting).

Wallace's name on the ballot prevented the Ohio legislature or the courts from fashioning a constitutional procedure for qualifying.[69]

Despite these warnings, Justice Black's majority opinion rejected the justifications offered by the state—the need to avoid voter confusion, and the interest in preserving the stability of the political system by channeling factionalism into the two major political parties. The opinion created fears that all restrictions on ballot access would be struck down.[70]

In 1971, however, *Jenness v. Fortson*[71] sustained Georgia's qualifying procedure, which required independent candidates to produce the signatures of five percent of the state's eligible voters at the time of the last election for the office being sought. Justice Stewart's opinion stressed the stipulation that independent candidates for governor and president had gotten on the ballot in 1966 and 1968. "In a word, Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American life."[72] While new and minority parties are given a different route to the ballot, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."[73] The Court found an important state interest in showing a modicum of support before printing a candidate's name on the ballot—at least in "avoiding confusion, deception, and even frustration of the democratic process."[74] While this test, too, was imprecise, it signaled the Court's retreat from a rigid reformation of state election laws.

In the 1973 term, in cases dealing with the California[75] and Texas[76] schemes, Justice White once again summed up the Court's accumulated experience. He projected that most state laws would likely meet the Court's standards.[77] The interest in the stability of the state's voting system justified denying ballot placement as an independent to candidates affiliated with a party within twelve months of the primary—this, in turn, requiring early planning, and avoiding pique, quarrels, and short-range goals.[78] The state's interest in protecting the integrity of its political process against fraudulent or frivolous candidates was congruent with Madison's belief, in *The Federalist*, "that splintered parties and unrestrained factionalism may do significant damage to the fabric of government."[79] Minority parties seeking access to the ballot may be called on to show a "significant, measurable quantum of community support."[80]

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[69] *Id.* at 68.

[70] *See Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1133 n.68 (1975).

[71] 403 U.S. 431 (1971).

[72] *Id.* at 439.

[73] *Id.* at 442.

[74] *Id.*

[75] Storer v. Brown, 415 U.S. 724 (1974).

[76] American Party of Texas v. White, 415 U.S. 767 (1974).

[77] Storer v. Brown, 415 U.S. 724, 730 (1974).

[78] *Id.* at 734-36.

[79] *Id.* at 736.

[80] American Party of Texas v. White, 415 U.S. 767, 782 (1974).

The Court remanded a challenge to a law that required an independent candidate to collect signatures of five to six percent of the electorate.[81] Although this percentage was not excessive there was a question whether provisions limiting signatures to those collected within a limited time from persons who had not voted in the primary made this an unduly burdensome requirement. Justice White called for fact-finding as to whether "in the context of California politics," a "reasonably diligent independent candidate [could] be expected to satisfy the signature requirements" or could only rarely succeed.[82] Past experience was to be a helpful, though not controlling, guide.

On the same day that the Court reached this pragmatic solution to the problem of signature requirements, it held that a state could require filing fees for persons seeking ballot access, but that an alternative method must be provided for indigent candidates to prove the seriousness of their candidacies.[83] This holding recognized the need to protect the political process from the frivolous fragmentation of "laundry list" ballots, while mitigating the unequal impact of the financial requirement for indigent candidates.

In broad terms, the ballot access cases may be likened to the reapportionment cases. Initially there was a necessity for judicial intervention to break a political stranglehold that blocked corrective political action and, at first, the constitutional ideal prompted broad judicial commands. Ultimately, however, a regard for complex political realities resulted in judicial respect for legislative choices and an experimental approach.

III. POLITICAL THICKETS IN *Buckley v. Valeo*

With this background, let us revert to the regulation of the political process through limitations on campaign contributions and expenditures. The passages of the Supreme Court majority opinion in *Buckley* that upheld provisions of the 1974 campaign finance law are linked by this feature: They are tentative judgments, made for the Act on its face but subject to revision and exemptions in the light of experience, by a Court alert to any indication that the Act in application may be tilted to lock out new or minority parties and candidates.

Compulsory disclosure of the sources of a party's contributions was upheld, on an eight to one vote, as serving the interest of informing the electorate and preventing the corruption of the political process.[84] But the Court recognized that such disclosure might impose an undue burden on the associational rights of some unpopular parties and candidates.[85] The

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[81] Storer v. Brown, 415 U.S. 724, 738-46 (1974).
[82] *Id.* at 742.
[83] Lubin v. Panish, 415 U.S. 709 (1974).
[84] 424 U.S. at 66-68.
[85] *Id.* at 71.

Court did not grant a blanket exemption for all minor parties,[86] but held that minor parties could obtain relief by showing "a reasonable probability that the compelled disclosure of contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."[87] It held that minor parties must be allowed "flexibility" in making such a showing,[88] and cited, at least without disapproval, a three-judge district court opinion holding that allegations and affidavits of a branch of the Socialist Workers Party sufficed to withstand dismissal.[89]

Public financing provisions were sustained with a similarly tentative and flexible approach. The Court rejected only claims of facial invalidity, and left open the "possibility of concluding in some future case, upon an appropriate factual demonstration, that the public financing system invidiously discriminates against nonmajor parties."[90] As of the present time, however, "[a]ny risk of harm to minority interests is speculative due to our present lack of knowledge of the practical effects of public financing and cannot overcome the force of the governmental interests [involved]."[91]

Contribution limitations were sustained—notably the maximum of $1,000 to a candidate. The Court found these an appropriate weapon to cope with dependence of candidates on larger campaign contributions. "To the extent that large contributions are given to secure political *quid pro quo*'s from current and potential office holders, the integrity of our system of representative democracy is undermined."[92] Of "almost equal concern" was public awareness of opportunities for abuse, heightened by post-Watergate disclosures.[93] "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.' "[94] And Congress "was surely entitled to conclude" that mere disclosure of large contributions would not suffice.[95]

The Court then turned to the claim that contribution limits favored incumbents. "[T]o the extent that incumbents are more likely than challengers to attract very large contributions, the Act's $1,000 ceiling has the practical effect of benefiting challengers as a class."[96] Plaintiffs made broad generalizations, but "the practical impact" of contribution ceilings in any given election would depend on many factors, and "the record provides no basis for predicting" that they "will invariably and invidiously benefit incumbents as a class."[97] The Court noted the existence of advantages and disadvantages in incumbency. Congress, it was found, was amply justified in putting the same constraints on both incumbents and challengers, for corruption and its appearance were dangers for both.

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[86] Chief Judge Bazelon, in his partial dissent from the court of appeals' en banc decision, had argued that a blanket exemption for minor parties was necessary because of the difficulty of presenting formal proof of the "chilling" effects of disclosure. Buckley v. Valeo, 519 F.2d 821, 909-10 (D.C. Cir. 1975) (en banc) (Bazelon, C.J., concurring and dissenting).

[87] 424 U.S. at 74.

[88] *Id.*

[89] *Id.* at 71 n.87 (citing Doe v. Martin, 404 F. Supp. 753 (D.D.C. 1975)).

[90] *Id.* at 97 n.131.

[91] *Id.* at 101.

[92] *Id.* at 26-27.

[93] *Id.* at 27. The Supreme Court cited the District of Columbia Circuit opinion, 519 F.2d 821, 839-40 nn. 36-38, which noted the disclosures of contributions by the milk interests, applicants for ambassadorial posts, and large corporations.

[94] 424 U.S. at 27 (quoting Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 565 (1973)).

[95] *Id.* at 28.

[96] *Id.* at 32.

As to discrimination against minor party and independent candidates, this was deemed "more troubling," but it was nevertheless held that "the record provides no basis" for finding invidious disadvantage.[98] Generally these candidates do not receive as many contributions in excess of $1,000 as do incumbents.[99] Thus, the record was termed, "virtually devoid of support" for the claim that the $1,000 limit would seriously curtail the launching and scope of such candidates.[100] Plaintiffs had stressed that in the past candidates like Eugene McCarthy had gotten started only with large "seed money" contributions as from Stewart Mott. The Court replied: "[T]he absence of experience under the Act prevents us from evaluating" the assertion that the $1,000 ceiling will prevent the acquisition of "seed money" needed to begin a campaign.[101]

Disclosure of contributions overrides privacy of political association, which has constitutional values.[102] With a limitation of contributions, political freedom is rendered less than absolute.[103] The conclusion that the limitations on these freedoms were supported by an overriding public interest was sound, in my view, but certainly debatable. What strikes a careful reader of the opinion, however, is the Court's acceptance for the present of the legislative judgment that the public interest in reform is overriding, while reserving for the future the possibility of reconsidering whether the provision operates in the real world not merely as a limitation but as an effective exclusion from the political process.

Strikingly different from the pragmatic tone, experimental outlook, and fact-and-record oriented discussion of the passages upholding the foregoing provisions, are the virtually adjoining passages that invalidate ceilings on overall campaign expenditures in a campaign for federal office, on a candidate's expenditures from his own funds, and on amounts that can be expended by a supporter directly on behalf of a candidate rather than by contribution.

A close look at these passages discloses that the Court rested its conclusions on undemonstrated, and possibly undemonstrable, assertions about the way the statute would affect political life.

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[97] *Id.* at 33.

[98] *Id.*

[99] *Id.* at 33 n.39.

[100] *Id.* at 34.

[101] *Id.* at 34 n.40.

[102] *See, e.g.*, Talley v. California, 362 U.S. 60 (1960).

[103] The basis for a distinction between limitation on contributions and limitation on expenditures presents a separate issue that will be discussed below.

The majority opinion laid the foundation for its action in a doctrinal section entitled "General Principles." The Court emphasized at the outset that the first amendment affords the broadest protection to political expression " 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[104] But in previous contexts this had meant to strike any prohibition or chill of the *content* of ideas interchanged. Here the equal money limits are concededly neutral as to the content of ideas exposed—a crucial point.

The Court then argued that because the statute's provisions limit the quantity of money available they place substantial and direct restrictions on the ability to engage in political discussion. It rejected the view of the District of Columbia Circuit, that money contains a nonspeech element subject to regulation,[105] and accepted the view, capsuled by Justice Stewart in oral argument, that money is speech.[106] The Court then found that a restriction on the amount of money a person or group can spend necessarily reduces the quantity of expression, by restricting the number of issues discussed, the depth of exploration, and the size of the audience reached.[107]

The Court's examination of the burden on political speech imposed by the statute is marked more by reliance on the simple equation of money and speech than by careful examination of the complex relationship between the two. Justice White, dissenting, summarized the Court's argument with the observation that the majority's conclusion of serious curtailment lay in its premise—accepting the maxim that "money talks."[108] Anthony Lewis in the *New York Times* pushed the point even further: "We know that money talks; but that is the problem, not the answer."[109]

The Supreme Court says that limits on spending necessarily limit the number of issues discussed. That is a factual assertion without factual support. In 1976 the presidential candidates were under (equal) campaign limits. Is there a conviction that if it had not been for the limitations the candidates would have discussed other issues? Of course, in 1976, there was communication not only through the funds expended by the candidates themselves, but through the debates held under the sponsorship of the League of Women Voters. But that still left discussion under limits—with

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104. 424 U.S. at 14 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

105. *See* 519 F.2d at 840-41. My colleague Judge Wright has outlined why, in his view, "money is not speech" in the Meiklejohn Lecture given at Brown University. *See generally* Wright, *Politics and the Constitution: Is Money Speech?* 85 YALE L.J. 1001 (1976).

106. 424 U.S. at 16.

107. *Id.* at 19.

108. *Id.* at 262 (White, J., dissenting).

109. Lewis, *The Court on Politics*, N.Y. Times, Feb. 5, 1976, at 33, col. 1. Having heard that I quoted this in my speech, Mr. Lewis advised that he first heard the phrase on the lips of Paul A. Freund.

the same limit imposed on the two major candidates. Does the existence of limits erode free speech?[110]

Alexander Meiklejohn has been particularly concerned with the relation of free speech to self-government. In a passage that has some celebrity, and indeed was quoted in an earlier opinion by Chief Justice Burger,[111] Meiklejohn emphasizes that the first amendment's primary concern is that all points of view be heard—rather than that the amount of speech be unlimited. This is the essence of the town meeting, says Meiklejohn, and adds:

> The First Amendment is not the guardian of unregulated talkativeness. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said. To this end, for example, it may be arranged that each of the known conflicting points of view shall have, and shall be limited to, an assigned share of the time available.[112]

While the *Buckley* opinion does not take notice explicitly of the Meiklejohn view of the first amendment, it has been characterized as insisting on an individualist view of freedom of expression as contrasted with Meiklejohn's collectivist or instrumentalist view.[113] This is a courtly way of commending the absolutist abstraction and disparaging the pragmatic. Meiklejohn prizes free speech as the means of assuring needed innovation and renewal for a democratic society. More broadly, as my colleague Judge Carl McGowan put it in *Ripon,*[114] the first amendment guarantees an unfettered interchange of ideas to bring about political and social change. When there is no fetter on the content of ideas interchanged, is there an inadmissible burden from limits on volume that are reasonable in amount and applied on an equal footing? Surely the validity of enough equal time as a supple and vital principle is known to the courts, and indeed applied by them every day as trial judges limit time for summation to juries, and appellate courts curtail briefs and oral argument. Surely it is accepted by all who have seen, heard, or read of political debates, from 1858 to 1976.

If unfettered expenditures were really a central feature of the first amendment, inherent in the right of free speech and inalienable, would the Court have upheld an expenditure ceiling as a condition of receiving public financing? The Court does not advert to the doctrine of unconstitutional conditions—surprisingly, for that doctrine, though much limited, has vitality.[115] But suppose the Congress had provided twenty million dollars to each presidential candidate on condition he did not discuss busing, or sought to set further limits on the amount that might be spent in news media. That would indeed raise serious first amendment questions,[116] and likely be held invalid even when exacted as a condition of a grant.

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[110] Similarly, it might be asked whether congressional candidates, not subject to any effective expenditure limitations, explored more issues or reached greater depth than did presidential candidates. While the presidential nominees were limited to spending about 50 cents a vote, senators and representatives spent up to $5 a vote. Fritchey, *Two Houses For Sale or Rent*, Washington Post, Feb. 26, 1977, at 13, col. 1.

[111] CBS v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973).

[112] A. MEIKLEJOHN, POLITICAL FREEDOM 26 (1960).

[113] *See* Polsby, Buckley v. Valeo: *The Special Nature of Political Speech*, 1976 SUP. CT. REV. 7.

[114] *See* Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976) ("Speeches and assemblies are after all not ends in themselves but means to effect change through the political process").

This is not a lance at the Court's opinion for lack of internal consistency. On the contrary, although the seams of stylistic difference show where different authors were joined for an overall "per curiam," the opinion is a remarkable achievement, reflecting considerable craftsmanship, particularly when one considers the number of issues discussed and the limited time at hand. Yet there is enduring significance in the acceptance of limitations on expenditures as a permissible condition for public financing, when it seems plain enough that the Court would never have accepted a condition of financing that prohibited discussion of certain topics (the tariff, oil imports, the treaty with Panama?). The line of reconciliation was not spelled out. But it seems to me that the Court must have been aware that even assuming that expenditure limits represent some limits on speech they are substantially and significantly less restrictive than content prohibitions. In the area of "basic" freedoms, the Court appears to have developed an array of importance, different tiers of constitutional rights with the extent of requisite justification depending on the tier.[117] Without pausing for labels or doctrines, one can fairly say that even if "money is speech," limitation of amount is constitutionally different from limitation of content.

Does the first amendment prohibit limits on volume of speech? In *Kovacs v. Cooper*,[118] the Court upheld a ban on the use of loud and raucous sound trucks for conveying ideas on the public streets. Professor Freund has put it:

> The right to speak is . . . more central to the values envisaged by the First Amendment than the right to spend. [Just] as the

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[115] *See* Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[116] A statute limiting the amounts that candidates could spend on the media was held invalid in Abercrombie v. Burns, 377 F. Supp. 1400 (D. Haw. 1974). The Solicitor General's amicus curiae brief in *Buckley*, at 68, cited this case for the proposition that regulation of expenditure is invalid, but failed to call the Court's attention to the following statement: "[I]mplementation of the 'principle of equality of opportunity to participate in the political process' . . . is a noble objective. But this objective is fulfilled by the limitation on total campaign expenditures. . . ." 377 F. Supp. at 1402.

This omission is uncharacteristic for memoranda on briefs emanating from the office of Solicitor General. For the Justice Department's tradition of candor, and its cardinal significance, see Leventhal, *What the Courts Expect of the Federal Lawyer*, 27 FED. B.J. 1 (1967).

[117] *See generally* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Recently, the Court seems to have developed a new "tier" for sex distinctions, less important than invidious discrimination but requiring more than a mere rationality justification. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

[118] 336 U.S. 77 (1949).

> volume of sound may be limited by law, so the volume of dollars may be limited, without violating the First Amendment.[119]

The *Buckley* Court distinguished *Kovacs* as involving a limit on "the *manner* of operating a soundtruck, but not the *extent* of its proper use."[120] With all deference, limit on manner does mean limit on extent, and on audience reached. The basic point is that the Court liked the reason for the sound limit—privacy and quiet.

Thus, the central flaw in the Court's introductory analysis is that it derives one "General Principle" from another without examination of the underlying empirical realities. It simply assumed that volume limitations will have a restrictive effect on the free interchange of ideas and then assigns to those limitations the same high burden of justification demanded of statutes which discriminate on the basis of content.

It is easy to get derailed in semantics if we ask questions phrased in generalities like, "Is money speech or is it also non-speech?" The central question is: What is the interest underlying regulation of campaign expenses and is it substantial? The critical interest, in my view, is the same as that accepted by the Court in upholding limits on contributions. It is the need to maintain confidence in self-government, and to prevent the erosion of democracy which comes from a popular view of government as responsive only or mainly to special interests.[121]

Unfortunately the Court's discussion of the interests supporting expenditure limits seems to suffer from the same methodological flaw as its analysis of the burden imposed: a failure to examine the actual facts of political life. Of course, the Court could not measure the effectiveness or benefits of the expenditure limits by examining political life as regulated by the new statute; no experience had yet been accumulated. But what is missing from the Supreme Court's opinion is any sense of the history of campaign reform legislation, of the grievous abuses that prompted it, the frustration that accompanied it, the evasion and political pressures that have undermined all less-than-comprehensive measures of reform.

Holdsworth tells us that as early as 1677 the House of Commons passed a standing order that if anyone should spend above ten pounds before election "in order to [carry] such election . . . it shall be accounted bribery" and the seat vacated.[122]

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[119] Freund, *Commentary*, in A. Rosenthal, Federal Regulation of Campaign Finance: Some Constitutional Questions 72 (1972).

[120] 424 U.S. at 18 n.17.

[121] In the record were polls on confidence and alienation run by the University of Michigan. The question is set forth in the District of Columbia Circuit opinion: "Would you say the government is run by a few big interests looking out for themselves or that it is run for the benefit of all the people?" In 1964, the answer "benefit of all" ran 64% and the "few big interests" ran 29%. Over the years the perception of "few big interests" rose in percentage, from 29% to 34%; 39%; 49%; and then in 1974 to 70% on a poll prepared for the Republican National Committee. *See* Buckley v. Valeo, 519 F.2d 821, 839-40 (D.C. Cir. 1975) (en banc).

[122] VII W. Holdsworth, History of English Law 264 n.4 (1924).

If we focus on the steps taken in the United States early in the century to restore the faith of the plain people in our political institutions, the history is not hard to find.[123] Theodore Roosevelt was the key figure, sensitive to the accusation that the Republican Party was the party of the monied interests.

In the closing days of the 1904 campaign, Alton Parker charged that the Republican Party was being financed by corporation and trust magnates, and that Secretary of Commerce Cortelyou was devoting his special knowledge of trust practices to exhort contributions from corporations. Roosevelt called this false, but the general truth of the charges was later borne out in such places as Charles Evans Hughes' 1905 New York life insurance investigation, and Hearst's publication of the Standard Oil letters. Roosevelt "quickly responded to the national mood."[124] He urged and in 1907 secured a law to stop contributions by corporations.

Roosevelt's famed 1907 address outlined the danger that such laws would be "disobeyed by the unscrupulous" and penalize the honest. He proposed public financing of the parties.[125]

Roosevelt's presidency sought mounting control over the trusts and special interests that he viewed as a threat to self-government. After he stepped down, his celebrated August, 1910 speech, "The New Nationalism,"[126] drew a broad picture of the nation's needs in the ongoing fight for effective self-government. The "New Nationalism" speech merits the most careful attention, as one in which Roosevelt "helped to create much of the rhetoric of American politics in this century."[127] Rhetoric is not action, but it crystallizes values, and what is law but the application of sanctions to those values that are held most dear.

In these post-presidency reflections, Theodore Roosevelt gave effective expression to the American political ideal of the equality principle—not equality of reward but equality of opportunity. "In every wise struggle for human betterment one of the main objects, and often the only object, has been to achieve in large measure equality of opportunity. . . . The essence of the struggle is to equalize opportunity, destroy privilege."[128] "If our political institutions were perfect, they would absolutely prevent the political domination of money in any part of our affairs." And he called specifically for "a corrupt practices act effective to prevent the advantage of the man willing recklessly and unscrupulously to spend money over his more honest competitor."[129]

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[123] *See* United States v. UAW, 352 U.S. 567, 570-76 (1957), where Justice Frankfurter traces this history.

[124] *Id.* at 572.

[125] H.R. Doc. No. 1 (pt. 1), 60th Cong., 1st Sess. xlvii (1910), *quoted in* Buckley v. Valeo, 519 F.2d 821, 836 (D.C. Cir. 1975) (en banc).

[126] T. ROOSEVELT, *The New Nationalism*, in THE NEW NATIONALISM (1961).

[127] Fairlie, *In Defense of Rhetoric*, Washington Post, Dec. 26, 1976, at C8, col. 1.

[128] T. ROOSEVELT, *supra* note 126, at 25-26.

[129] *Id.* at 37.

The 62d Congress elected in 1910—Democrats now controlling the House, allied on some issues with the so-called "insurgents" among the Republican Senators[130]—passed in 1911 the law that put on the books campaign spending limits for senators and congressmen.[131]

Those limitation laws were circumvented by the proliferation of committees all supporting the same candidate. But their need and propriety were never doubted—until 1976.

When Truman Newberry was charged with violating the Act's expenditure limitations in procuring the 1918 Republican nomination to be senator from Michigan there was no voice that Congress lacked the power to limit expenditures. In 1921 the Supreme Court dismissed on the ground that Congress could not regulate expenditures in primaries.[132] On the facts, there was much doubt whether Newberry knew of the expenditures involved, and Justices White, Pitney, Brandeis, and Clarke, concurring, voted for reversal because of the instructions on vicarious liability. But it is notable that these four all voted to reverse and remand for a new trial—which of course assumed the validity of an expenditure limitation.[133]

When in 1925 Congress moved to update the corrupt practices act, it maintained expenditure ceilings for federal elections. The vitality of expenditure ceilings was underscored by their use in the Senate's internal proceedings—even in connection with primaries, which *Newberry* had placed outside the statutory prohibition.[134]

Commentators have been dubious about these Senate actions—but largely on the ground that they were not based on specific standards.[135] Certainly they seem to reflect a political and public consensus that excessive political spending does not mark a fundamental right but is rather a kernel of corruption, and that its extirpation enhances representative democratic government.

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[130] C. BEARD, CONTEMPORARY AMERICAN HISTORY, 1877-1913, at 339 (1971 ed.).

[131] Act of Aug. 19, 1911, ch. 33, § 2, 37 Stat. 25 (updated as the Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070 (repealed 1972)).

[132] Newberry v. United States, 256 U.S. 232 (1921).

[133] *Id.* at 258 (White, C.J., concurring and dissenting), 275 (Pitney, J., concurring).

[134] Two candidates elected in 1926 were denied their seats partly because of excessive spending in the primary. The Senate resolution barring Frank L. Smith of Illinois from his Senate seat called attention to a conflict of interest violative of Illinois law (*see* 69 CONG. REC. 1718 (1928); S. REP. No. 92, 70th Cong., 1st Sess. (1928)) but apparently the controlling reason was the disclosure that in the primary he had spent more than $500,000.

The Report adopted by the Senate stated:

> That the acceptance and expenditure of the various sums of money aforesaid in behalf of the candidacy of the said Frank L. Smith is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of government, and taints with fraud and corruption the credentials for a seat in the Senate presented by the said Frank L. Smith.

L. OVERACKER, MONEY IN ELECTIONS 280 (1974) quotes this passage as giving the controlling reason for Smith's exclusion.

The other Senate action concerned the spending in the primary contest between the Vare and Mellon factions in Pennsylvania. A committee report estimated that the victor, William S. Vare, had spent $785,000; George Wharton Pepper, the Mellon candidate, $1,800,000; and Governor Gifford Pinchot, running as an independent, $187,000. The Senate's refusal to seat Vare was partly because of charges of corruption and fraud and partly because of the huge expenditures of money. L. OVERACKER, *supra*, at 283.

[135] *See* L. OVERACKER, MONEY IN ELECTIONS 283-84 (1974).

When the Hatch Act was passed in 1939 to correct political abuses, it put expenditure limits on the national political committees.[136] The substantial purpose of expenditure limits for congressmen was to be furthered by the addition, in the following year, of ceilings on contributions to campaign committees.[137]

These federal ceilings on both contributions and expenditures were widely circumvented through the proliferation of committees. Committees openly supporting candidates called themselves independent, claiming to operate without the knowledge or consent of the candidates. Sometimes they had some independent life in terms of personnel—and frequently had symbolic cross-over titles like Democrats for Nixon, Businessmen for McGovern. Often they were vest pocket committees.

Professor Dennis W. Brogan of Cambridge University, who continues in the De Tocqueville-Bryce tradition of illuminating critiques of the American political scene by foreign analysts, discussed the Hatch Act expenditure limits and their circumvention in these terms: "If an effective way of reducing the exorbitant cost of elections could have been found, it would have been a gain for electoral purity and the democratic freedom of choice. But the method chosen was not very happy."[138] The 1974 campaign law sought to put an end to such circumvention by concentrating responsibility in the candidate's personal committee.[139]

Thus expenditure limits—and circumvention of them—have long been a part of American political life. Ironically, it was the later-added contribution ceiling that the Court held valid and indeed sufficient to achieve integrity in elections. One can only conjecture whether, if the expenditure limitations had stood alone—as they did between 1911 and 1940—this Court would have held them invalid.

Another issue arises, however, with the proposition that the contribution ceilings will not be effective alone unless reinforced by expenditure limits.

Justice White observed that

> expenditure ceilings reinforce the contribution limits and help eradicate the hazard of corruption. . . . Without limits on total expenditures, campaign costs will inevitably and endlessly esca-

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[136] Act of Aug. 2, 1939, ch. 410, § 20, as added, July 19, 1940, ch. 640, § 4, 54 Stat. 767 (updated in Act of June 25, 1948, ch. 645, 62 Stat. 723) (repealed 1972).

[137] Act of July 19, 1940, ch. 640, § 4, 54 Stat. 767 (updated in Act of June 25, 1948, ch. 645, 62 Stat. 723) (repealed 1976).

[138] D. W. Brogan, Politics in America 221 (1960).

[139] Briefly, the candidate's personal committee is made the "principal committee." Other committees for a candidate may be formed, but they take ancillary status, and report to the principal committee which centralizes reporting. This enforces ceilings in behalf of candidates. Single individuals spending over $100 file their own reports—if they are operating independently.

> late. Pressure to raise funds will constantly build and with it the temptation to resort in "emergencies" to those sources of large sums, who, history shows, are sufficiently confident of not being caught to risk flouting contribution limits.[140]

Further, because expenditures usually occur in public, they are harder to conceal or rearrange than contributions and their sources. Thus expenditure limits, in addition to limiting temptation, facilitate enforcement of contribution limitations.

Expenditure limits have also been thought to be necessary to reduce the temptation to spend excess campaign funds for illegal purposes. Justice White pointed out that "One would be blind to history to deny that unlimited money tempts people to spend it on *whatever* money can buy to influence an election."[141] Yet illegal activities are low in a campaign organization's priorities, and would be jettisoned when there just wouldn't be enough of "that kind of money" to go around. While this thesis may not be easily provable as a hard fact in an evidentiary hearing, the hearings of the Ervin Committee and the House impeachment sessions give vitality to the thought that the large sums available to the Committee to Re-Elect the President were fuel, if not spark, for the deviltry of its staff and recruits.

Thus, expenditure limitations gained from a history of national use were to play an integral role in the 1974 scheme of election reform by aiding in the enforcement of contribution limits and other statutory prohibitions.

The Supreme Court concluded, however, that campaign expenditure limits were not necessary to prevent illegal contributions and expenditures. It rejected the apparent congressional findings of need on the grounds that the reporting and disclosure requirements would facilitate detection of violations[142] and that the Court could find "no indication" that criminal penalties and ensuing political repercussions were insufficient to enforce the contribution limits.[143] The Court further determined that, since moneys could be used for other than campaign expenses, expenditure limits would not reduce the temptation to illegal giving.[144] In sum, the Court struck down the limits on total campaign spending by offering its own speculation as to how the measures would operate.[145]

The serious potential for error in the Court's projections about the effects of the regulatory scheme is illustrated in one passage concerning the limit on independent expenditures by a person calling expressly for a candidate's election. The majority opinion invalidated this provision on the grounds that it would be ineffective and unnecessary: ineffective, because it would be circumvented by the "ingenuity and resourcefulness" of persons and groups seeking influence with the candidate; unnecessary, because any person seeking to coordinate his expenditures with the candidate would be blocked by the fact that this would be considered a contribution subject to the contribution limitation.[146] Upon reflection, it is clear that these two statements are based on inconsistent assumptions about human behavior and political life. Moreover, it is difficult to see on what basis the Court can confidently predict that persons engaged in political life will be able to evade one statutory provision but unwilling or unable to evade another.

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[140] Buckley v. Valeo, 424 U.S. 1, 264 (1976) (White, J., concurring and dissenting).
[141] *Id.* at 265.
[142] *Id.* at 55 (per curiam).
[143] *Id.* at 56.
[144] *Id.*
[145] *Id.* at 45.

The Court's approach raises two questions. The first is whether the judiciary is justified in relying on such necessarily speculative predictions in ruling a law invalid.

The second—and for me more difficult—is whether life-time judges, removed from the political arena on principle, can overturn the judgments of legislators on political realities, when the legislators are part and parcel of political life as a matter of principle. Justice White, who had experience in 1960 as the head of Citizens for Kennedy, was concerned with what the District of Columbia Circuit had called the "magnetic"[147] pull of unlimited expenditures, with the escalation of projections for campaign expenditures and with recent and extensive revelations of concealment of huge illegal contributions by Gulf Oil and many other corporations. The majority, disagreeing with Justice White, did not and could not cite empirical evidence for its rejection of the assertion that expenditure limits would be useful and perhaps necessary to enforce the contribution ceilings.

IV. JUSTIFICATION FOR EXPENDITURE LIMITATIONS: SELF-GOVERNMENT, EQUALITY, AND ENHANCEMENT OF DISCUSSION

Expenditure limitations rest on underlying value judgments that go beyond speculations or predictions as to likely consequences for campaigns. Assuming that expenditure limits do put burdens on candidates' expression, there is, nevertheless, a substantial claim of justification for the ceilings in the principles of self-government, equality, and first amendment expression.

An analysis of these interacting principles may usefully begin by reverting to the underlying need for public confidence in the integrity of representative government. This may justify government controls on freedoms. As already noted, it supported the Hatch Act prohibition on political campaigns by civil servants[148] and the limitation on political association through contribution ceilings.

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[146] *Id.* at 46-47.

[147] *Id.* at 264 (White, J., concurring and dissenting).

[148] *See* Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548 (1973); text accompanying notes 93-95 *supra*.

A. *Self-Government*

As an exercise of their powers of self-government, the American people sought to put a cap on the escalating pressure for campaign fund-raising. The District of Columbia Circuit emphasized that candidates were being increasingly required to devote themselves to fund-raising gatherings, as contrasted with speeches and discussion of issues.[149] Justice White found a weighty interest in diluting the "influence inevitably exerted by the endless job of raising increasingly large sums of money."[150]

The *Buckley* majority responded:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.[151]

This answer ignores the possibility that the dynamics of some campaign problems are such that they cannot be solved by individual decisions; the race for campaign funds—like an arms race—requires global regulation.

Moreover, the Court gives no weight to the principle, emergent in the reapportionment cases,[152] that the legislature's choices about the structure of the electoral process are entitled to judicial deference, as long as the legislature is itself open to all. In striking down the expenditure limitations, the Court is saying that the people have no ability to vote their conviction that both candidates are caught in a vicious spiral of expenditures. There is some folk wisdom in the jest: "I don't vote, it only encourages them." A court that is concerned with public alienation and distrust of the political process cannot fairly deny the people the power to tell the legislators to implement this one-word principle: Enough!

B. *Equality*

The House Committee Report which accompanied the 1974 Election Law amendments stated: "Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign."[153] The expenditure limits in the Act were intended to equalize spending and restore public confidence in the democratic breadth of representative government, but the Supreme Court rejected this justification.

The issue is most vividly joined by the provision limiting the amount a candidate may spend of his personal funds in the course of a campaign.

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[149] 519 F.2d at 838.

[150] 424 U.S. at 265 (White, J., concurring and dissenting).

[151] *Id.* at 57 (per curiam).

[152] *See* text accompanying notes 11-63 *supra*.

[153] H.R. Rep. No. 93 [illegible] 2d Sess. 3 (1974).

Here, as the Court rightly noted, there is no interest in limiting contributions by persons seeking influence, and indeed the use of a candidate's own funds reduces the need for contributions.

In invalidating this provision, the Court found it "of particular importance that candidates have the unfettered opportunity to make their views known."[154] The Court disclaimed even the interesting suggestion of Justice Marshall, who detached on this one point from the majority, that the limitation on spending of personal funds could be viewed as a limit on a candidate's "contribution" to his own campaign.[155]

The *Buckley* opinion makes a single, almost off-hand reference to the principle of equality, noting that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment. . . ."[156] In support of this statement the Court relies on two opinions[157] which, fairly read, stand only for the proposition that the equality principle cannot override freedom of the press.[158] The Court's opinion gives no evidence that it probed the roots and development of that principle. This is particularly striking, in view of the Court's own attachment to equal protection doctrine as a living force,[159] and its awareness of the need for accommodation to the appearance as well as the integrity of self-government.[160]

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[154] 424 U.S. at 52-53.

[155] *Id.* at 287 (Marshall, J., concurring and dissenting).

[156] *Id.* at 48-49 (per curiam).

[157] In Mills v. Alabama, 384 U.S. 214 (1966), the Court was confronted with a conviction of a newspaper editor under a law which made it a crime for him to publish an editorial on election day advocating a stand on a ballot issue. The Court struck down the law as an "abridgment of the constitutionally guaranteed freedom of the press," *id.* at 219, and ventured no broader holding. The principle of equality was not implicated or discussed.

In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court was asked to review a statute which required a newspaper to grant a right of reply to a candidate for political office whose character or record were attacked by the newspaper. After a relatively sympathetic restatement of the arguments for such access, *id.* at 247-54, the Court invalidated the statute, on the grounds that it "exacts a penalty on the basis of the content of a newspaper," *id.* at 256, and constitutes an "intrusion into the function of editors." *Id.* at 258. "It has yet to be demonstrated," the Court concluded, "how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.*

[158] Justice Stewart has made a distinction between the Constitution's protection for freedom of speech and freedom of the press, stating that "the Free Press guarantee is, in essence, a *structural* provision of the Constitution." P. Stewart, *"Or of the Press,"* Address at Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), *excerpted in* 26 HASTINGS L.J. 631, 633 (1975). The "structural" concept views the press as a continuing independent institution, equal in importance to and necessary as a check on the three branches of government. It might support more iron-clad protections for the press. But it does not assume that the free press is more important than the free speech guarantee. The point is rather that the free press is more likely to stimulate government's desire to control its "adversary" watchdog. *See* B. SCHMIDT, JR., FREEDOM OF THE PRESS V. PUBLIC ACCESS 32-36 (1976).

This special concern to avoid government control of the press establishes the context for rulings that the government may not compel the press to provide equality of speech to others, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974), and may not prohibit election day commentary by the press, Mills v. Alabama, 384 U.S. 284 (1966). This is not decisive on the issue of a generalized limitation on others, neither a prohibition nor a regulation of content, to avoid corruption or distortion of the political process.

[159] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966) ("The Equal Protection Clause is not shackled to the political theory of a particular era").

[160] *See* 424 U.S. at 27.

Earlier, attention was called to the history of campaign legislation, and its unfolding in the opening decades of the twentieth century. This was not an isolated phenomenon, but an integral part of the perceived need of a larger purpose of democratic government, the need of a self-governing people to trammel the exploding capabilities of what were called the vested interests.

Jacksonian Democracy brought vigor and a peculiarly American slant to the basic democratic concept that this is to be a government of the people and by the people. The latter part of the nineteenth century was perhaps the country's closest approach to the Adam Smith conception of laissez-faire, stressing industrial development that was not trammeled by government. Another aspect of the free market was also in evidence: buying political support. And the federal government was the pyramid of bribery by industry run rampant. By the time of Benjamin Harrison, Joseph Keppler's mordant cartoons in *Puck*, the satiric weekly, climaxed in the famous "Bosses of the Senate." This cartoon shows a row of huge human-headed money bags as the real power in that chamber. A sign on the wall reads: "This is a Senate of the Monopolists By the Monopolists and For the Monopolists." One historian put it that this was "hardly an exaggeration," adding: "The public regarded the Senate as a club of rich men—and rightly so."[161]

The entire period was called "The Gilded Age" by Mark Twain. The sting was in the Senate, self-proclaimed as the greatest deliberative body of the nation. Senators were particularly identified with the great interests—insurance, utilities, lumbering—which controlled the state legislatures and brought spokesmen to Washington. Railroads had an abundance in Senators Allison, Cameron, and Goreman. Preeminent, hailed as the spokesman of big business, was Senator Nelson W. Aldrich of Rhode Island, son-in-law of John D. Rockefeller, with wide interests in banking and manufacturing, proponent of the protective tariff and gold standard, and leader of the Senate opposition to the increasingly progressive Theodore Roosevelt. Other prominent men of enormous wealth in the Senate included Leland Stanford of California, John P. Jones of Nevada, and Johnson N. Camden of West Virginia. They were not hesitant to vote upon issues in which they had a personal interest. And so it was understood that if a man "had enough money he could buy a Senate seat."[162]

These men were not bribers or bribe-takers like those involved in Credit Mobilier. In fact, they regarded themselves as in the Hamiltonian tradition of binding the commercial interests to the federal government through mutual favors. But they were widely viewed as the negation of the democratic principle. In due time this led to the seventeenth amendment

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161. S. Lorant, The Life and Times of Theodore Roosevelt 247 (1959)
162. *Id.*

providing for the direct election of senators by the people, rather than by the state legislatures more easily bought. But there was a persistent demand among the American people for freedom from the distortion of wealth in the political process.

Equality is a principle that does not mean equality of rewards or capacity. Indeed, the infinite variety of our people is a source of the country's strength. What does stand as an abiding and enlarging principle is equality of *opportunity*, without deference to wealth, that enhances the principle of self-government. Mill, in his work, *Representative Government*, outlines that superiority of political influence should not be conferred on the basis of property, for "accident has so much more to do than merit with enabling men to rise in the world." The people are not "jealous of personal superiority, but they are naturally and most justly so of that which is grounded on mere pecuniary circumstances."[163]

The advancing equality principle, stated with eloquence in Theodore Roosevelt's address "The New Nationalism," also marks Justice Douglas' opinion in *Harper*, where the Court overruled the practices and decisions that once accepted as a matter of course the imposition of a poll tax as a condition of voting.[164]

Equality and liberty are joined together (and with fraternity) in national slogans, but as forces and precepts they often pull against each other. There is no ringing phrase to yield a simple answer to the dilemma. However, even the most stalwart exponents of the first amendment appreciate that there is force in the view that the state appropriately takes action lest "free spending of political money . . . turn the electoral process into a kind of auction."[165]

The principle of equality of opportunity extends, with constitutional protection, to the opportunity to participate in the political process as a candidate.[166] That appears from the ballot access cases, including those that prohibit filing fees that are excessive either on their face or in relation to the indigency of the candidate. That principle also supports total limits on campaign expenditures.[167] The ballot access cases were distinguished by the Court as involving a removal of burdens on candidates, whereas

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163. J.S. Mill. *Of the Extension of the Suffrage*, in Representative Government (1861). Mill's views on this point have special significance since he, like his father James Mill, was supported by the East India Company.

164. *See* note 159 *supra*.

165. Quoted from commentary of Walter Cronkite, CBS Radio Network (Nov. 18, 1976), suggesting legislative consideration of limitation on spending on initiatives, to cope with the situation in 1976, when, for example, initiatives in seven states on propositions to regulate growth of nuclear power plants found environmentalists and citizens' lobbies outspent four-to-one by power companies and industrial users.

This suggestion from a prominent and respected exponent of the first amendment may reflect a narrow view of the persons or interests entitled to full first amendment protection. This is not necessarily mere myopia of self interest or personal perspective. *See* reference to "structural" view of the free press guaranty, *supra* note 158.

166. Gordon, *The Constitutional Right to Candidacy*, 25 Kan. L. Rev. 545 (1977).

167. *See* Abercrombie v. Burns, 377 F. Supp. 1400, 1402.(D. Haw. 1974).

here the law imposes burdens.[168] It may well be that a preferable way to achieve equality of opportunity of candidacy would be to provide funds to those who present some indications of support. Indeed, this is probably the only avenue now available in the year after *Buckley*, and looming ahead are proposals to extend the principle of public financing to candidates for Congress.

This raises questions of allocation of resources, especially if the problem is viewed in terms of state and local offices, which are presumably also governed by *Buckley*. Whether the limited sums available to government, especially in a context of coping with inflationary pressures, should be spent for political candidates or other vital programs, is a matter of legislative choices. Posing it as a constitutional imperative may, in practical terms, be only a refusal to accept the importance of the interraction of the principles of equality and representative self-government.

C. *Enhancement of Discussion*

First amendment principles and objectives are involved in support of, as well as objection to, the expenditure limitation.

Professor Thomas Emerson's classic study, *Toward a General Theory of the First Amendment*, presents the matter broadly in these terms: There are "problems of reconciliation . . . where the state seeks to impose restrictions upon expression designed to purify the democratic process"[169] by restrictions like corrupt practices legislation and lobbying laws. "The purpose of such measures, at least in theory, is to promote the healthier and more efficient operation of a system of free expression. And the issue posed, again at least in theory, is not the reconciliation of freedom of expression with another kind of interest but the reconciliation of opposing interests within the system of free expression itself."[170] Such proposals are generally to be viewed as invalid abridgments of free expression. But there is no control of content, and they may be justifiable not only in theory—that restrictions "may, by limiting the freedom of some, expand the freedom of a greater number"—but also in practice.[171] "In practice, certain types of restriction have been employed without proving destructive."[172] Accordingly there is room for some exceptions. "By way of illustration, . . . certain restraints on expenditure of money in political campaigns" would qualify as an exception.[173]

Mill also directed himself to political reform that may involve restrictions on liberty. He commented in one article that measures of political and social reform are not to be rejected merely because they are contrary to liberty, for this "leads to confusion of ideas."[174]

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[168] Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976).
[169] T. Emerson, Toward a General Theory of the First Amendment 103 (1966).
[170] *Id.* at 103-04.
[171] *Id.* at 104.
[172] *Id.*
[173] *Id.* at 105.

Whether limits on spending are ultimately considered within the generality of impermissible abridgment or the exception, Professor Emerson correctly identifies the problem. An ultimate judgment depends on practice as well as theory, and whether the restriction operates in practice so that it "substantially interferes with expression, as in the case of unpopular groups. . . ."[175]

The *Buckley* Court broadly states: "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ."[176] This sweeping pronouncement begs the question by a pejorative statement of the equality principle.

Strict libertarians oppose all restrictions by government as evil. Samuel Johnson felt there were equal evils in unbounded liberty and attempts to bound it. But it is the working hypothesis of our law that government may restrict freedoms—if in furtherance of an important interest. Freedom of expression is considered a "preferred freedom" and efforts to curtail it have a burden of proof.

There is always a question of judgment as to purpose, impact, and balance. In Professor Karst's phrase, "no slogan—not even Equality" can substitute for a probing analysis of campaign finance legislation with "particularized balancing of the benefits it may provide by increasing diversity of political expression against its costs to political freedom."[177] But the prospect for the legislation is and should be to enhance expression if the overall effort is intended, and works, not to close the system, as by controlling the content, but to open it up.

The first amendment works to promote an open market in ideas. But we restrict the freedom of monopolists controlling a market to enhance the freedom of others in the market. At a time when liberty of contract had the constitutional preeminence today assigned to freedom of expression, Justice Holmes declared that principles of freedom cannot preclude government limits on the power of wealth in order to create a fair competition, and that the state can deny employers the right to extract yellow dog contracts "in order to establish the equality of position between the parties in which liberty of contract begins."[178] These examples can be distinguished as instances where the state enhances freedom by removing private restraints upon it. But they are suggestive of a pragmatic mode of thinking, which avoids focusing on the initial impact of a law, as a restriction, and looks at its overall effect.

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[174] Mill, *Periodical Literature—Edinburgh Review*, WESTMINSTER REV. 1, 509 (1824), *quoted in* J.S. MILL, ON LIBERTY 225 (D. Spitz ed. 1975).

[175] T. EMERSON, *supra* note 169, at 105.

[176] 424 U.S. at 48-49.

[177] Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 64-65 (1975).

[178] Coppage v. Kansas, 236 U.S. 1, 27 (1915) (Holmes, J., dissenting). As a judge on the Massachusetts Supreme Judicial Court, Holmes upheld picketing to permit combination of labor to meet the power of ownership "if the battle is to be carried on in a fair and equal way." Vegelahn v. Guntner, 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896).

Perhaps more directly in point are the cases in the free expression field where the Court *has* sustained restriction of some expression in the interest of its overall enhancement. Notable here is the *Red Lion* decision[179] upholding the fairness doctrine governing broadcast licensees. It represents an application of something like the equality principle not merely as a shield against government burdens but in an affirmative way. The *Buckley* opinion puts *Red Lion* aside on the ground that broadcast media present special problems not found in the "traditional free speech case."[180] But this Act also is not a "traditional free speech case," for the traditional case is one where there is a government effort to restrict *content* of speech. And in the traditional case there is no claim of enhancing expression and interchange.

Passages in the *Buckley* opinion rejoin that the law may not have the beneficent effects claimed. One says that equalizing expenditures "might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign."[181] Another says that the limitation on rich men may put them at a less than equal position, because "a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign."[182] These are patently speculations not given the possibility of proof or disproof by experience. Indeed, the hypothetical of the poor rich man raises at least the question why, if the law is permitted to stand, a rich candidate could not appeal for funds and explain he is limited by law in spending his own funds.

Past spending in congressional races was examined by the Court in some detail when it discussed contribution ceilings. It noted that about twenty per cent of the challengers outspent House incumbents in 1972 and 1974.[183] The Senate figures show greater incumbent dominance.[184] To what extent did past spending exceed the ceilings that became effective in 1975? The District of Columbia Circuit opinion[185] stated that the stipulated findings show that the law's ceiling was exceeded in the 1974 elections by only one of the forty successful House challengers; and by only twenty-two of 810 House candidates in all, of whom ten were incumbents,[186] nine were seeking open seats, and three were challengers.[187] The ceiling was exceeded on the Senate side by only thirteen candidates, nine of whom were incumbents.[188] The Supreme Court's opinion in *Buckley* stated that these data may require adjustment, and that the law's ceilings "would have required a reduction in the scope of previous House and Senate campaigns . . . ."[189]

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[179] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[180] 424 U.S. at 49-50 n.55.

[181] *Id.* at 57.

[182] *Id.* at 54.

[183] *Id.* at 32 n.36. Of the 40 challengers who unseated House incumbents, 22 outspent their opponents. *Id.*

[184] *Id.*

[185] Buckley v. Valeo, 519 F.2d 821, 861 n.105 (D.C. Cir. 1975).

These data are not conclusive. But to the extent that they have meaning, they indicate that campaigns exceeded the proposed limits in only a distinct minority of instances. They indicate more strongly that even in 1974—well known as a relatively poor year for incumbents—incumbents were more likely than challengers to have exceeded what was proposed as a ceiling, and to have benefited thereby.

Two weeks after *Buckley*, a candidate dropped out of a House race saying he had estimated he could raise $20,000 and would have persevered if his wealthy opponent had been limited to $70,000, but not in the face of a ruling leaving him free to spend without limit.[190] This incident identifies the possibility that the expenditure limit could and would operate to bring in new candidate voices. The problem of extreme disparity—the concern that lack of restrictions tends to operate so that an incumbent can drown out other voices of modest candidates—may justify an analogy to the *Kovacs* limitation on volume.[191] It would be hard to discover to what extent this led modest voices to shrink from past contests. But if the law had been permitted to go into effect, we could have gained some impression as to whether its substantial impact was to close down or open up the political arena to new voices.

V. GENERAL OBSERVATIONS ON JUDICIAL APPROACH AND PROCEDURE

Newspaper stories appearing the day after *Buckley* proclaimed that the Court had held the Act constitutional. One analyst was reminded of the 1954 incident when Senator Joseph McCarthy was censured on two charges out of five, and the Hearst headline proclaimed: "McCarthy Three-fifths Innocent."[192] My personal reaction was that the ruling on the expenditure limit may have knocked out a central feature of a program dependent on a number of interrelated provisions. Its removal may devitalize and destabilize this reform legislation. History is littered with instances when the collapse of reform measures was attributed to their inefficacy, though the real reason was inadequate implementation.

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[186] Nine of these ten incumbents won.

[187] Only one of these three challengers won.

[188] Eight of the nine Senate incumbents exceeding the limit were victorious; only one o the four challengers was.

[189] 424 U.S. at 20 n.21, 55 n.62.

[190] Wicker, *Money Talks Again*, N.Y. Times, Feb. 13, 1976, at 33, col. 1 (referring t Robert Kohlos, who had quit his job as secretary to Mayor Bradley of Los Angeles in order t run in the Democratic primary for Congressman).

[191] *See* text accompanying note 118 *supra*.

[192] George Agree, discussing a 1954 headline of the *New York Journal American*, in conference held Feb. 28, 1976 in Washington, D.C. entitled "Campaign Financing Regulatio Revisited."

A. *Pragmatic Outlook*

It is likely that the courts will continue to be faced with issues of reform legislation: new questions perhaps blended with recurring issues, questions as to the 1976 as well as the 1974 amendments. What should be the approach to attacks on statutes that implicate broad questions of political process, presenting both substantial prospects for improvement and possibilities of abuse or restrictiveness?

The proper attitude of the courts, in my view, is a pragmatic outlook. Not a mechanical attitude, but an outlook rooted in enduring values.

One may well say about a judicial approach to such cases what Cardozo said about the common law, that the underlying juristic philosophy should be the philosophy of pragmatism.[193] This is not to scant the ingredient of fundamental rights, constitutional imperatives, and ethical or social values that are steady and do not shift with every wind. These are integrated in the phrase "moral pragmatism."

The Court acted soundly, I think, in issuing an initial facial ruling upholding the reporting, disclosure, contributions, and public financing provisions of the Act—and announcing at the same time that if problems should develop, including those identified, the Court was open for more probing analysis in the light of experience.

The pragmatic approach stands in contrast to the dogmatic approach. In the reapportionment and ballot access cases, we saw the futility of a dogmatic judicial approach to problems of political process. Reality includes the complexities and compromise inherent in the democratic process. Rulings that bypass realities cannot endure.

The *Buckley* Court reasoned that expenditure ceilings "directly" limit expression, while contribution ceilings limit expression only "indirectly." But judicial history cautions that decisions based solely on such labels as "direct" or "indirect" regulation are likely to prove arid and to be discarded in favor of an approach which stresses the practical consequences of regulation. Examples come to mind from the commerce clause cases. In the 1936 *Carter* case,[194] the Court invalidated federal regulation of wages and prices in the coal industry as only "indirectly" related to interstate commerce. In the 1941 *Darby* opinion[195] upholding such regulation, the

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[193] B. Cardozo, Selected Writings 149 (Hall ed. 1947): "The juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute. The rule that functions well produces a title deed to recognition."

[194] Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[195] United States v. Darby, 312 U.S. 100 (

Court rejected an analysis of validity structured in terms of "direct" and "indirect" effect, and looked instead to "the total effect" on interstate commerce of the competition of small producers. In 1927 the *DiSanto* case held invalid a state law regulating foreign travel agents as placing a "direct burden" on foreign commerce.[196] Another 1941 opinion discarded that doctrinal approach. It instead considered the practical consequences of the situation and found that the regulation of "fraudulent or unconscionable conduct" was properly a "subject of local concern."[197]

The *Buckley* opinion did not rest solely on this "direct—indirect" analysis. There was interwoven a conception of the substantial consequences of the restriction on expression. One cannot believe that the Court would have been unaffected in its result and doctrine if there had been opportunity to show that in practical operation the Act served to broaden rather than narrow the meaningful range of political voices.

B. *Experience and Discussion*

To recognize the crucial role of experience does not derogate from freedom of expression. John Stuart Mill's famous essay *On Liberty* was itself a call for the *testing* of ideas, a plea against their banishment out of hand. He said that the essence of man, as either an intellectual or moral being, is "that his errors are corrigible. He is capable of rectifying his mistakes, by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted."[198] As John Dickinson pointed out in the constitutional debates, what is wanted is not reason as such, but reason to enable men to be guided by experience.[199]

That is the sound ideal of a democratic society, to resolve the tension between stability and corrective development with opportunity not merely for freedom of discussion, but for appraisal of experience with the entitlement of free discussion.

This leads, I submit, to the conclusion that where there is substantial possibility that a statute might enhance and expand political expression, it should be sustained as against *facial* attack and judged on its results.

The original doctrines of presumption of constitutionality have been qualified where laws restrict the "preferred" freedom of discussion.[200] But those have been cases where the countervailing state interest related to such concerns as maintaining order over traffic, cleanliness, and the like.

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[196] DiSanto v. Pennsylvania, 273 U.S. 34 (1927).

[197] California v. Thompson, 313 U.S. 109, 115 (1941).

[198] J.S. MILL, *supra* note 174, at 21.

[199] "Experience must be our only guide. Reason may mislead us." Quoted by W. SOLBERG, THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION OF THE AMERICAN STATES xcii (1958).

[200] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

When the interest claimed for the law is itself the possibility of opening up the political process, the scales should be weighted accordingly.[201]

In this context, the reason for sustaining the statute in case of substantial doubt is that experience can provide a corrective process of testing. A ruling of invalidity precludes such further testing.

My views are congruent with—although I have no need to go as far as—Professor Louis Lusky's interesting and indeed spacious theory of the interaction between court and legislature. His book[202] makes a distinction between fields in which the court retains plenary authority to render definitive constitutional rulings and those areas in which legislative silence produces necessity for "tentative" judicial decision, subject to reconsideration in the light of reflective legislative attention to the problems. An approach similar to Professor Lusky's has led me to address problems by searching for statutory rather than the constitutional grounds invoked by my colleagues,[203] and on occasion to stretch statutes with an expansive reading in light of modern concepts which goes beyond routine doctrines of legislative intent so as to gain the benefit of advances without the burden of a constitutional ruling that would preclude further legislative input.[204]

What I see as the common thread of Professor Lusky's proposal, and my more modest suggestion, is a concern to avoid preclusive dogmas, dogmas that inherently operate to preclude their reconsideration and correction.

The preclusion problem is less troublesome for rulings upholding statutes against facial attack. Rulings upholding laws as valid in the light of presumed facts, like rulings upholding laws because of emergencies,[205] can be reconsidered on a showing that the factual predicate no longer exists.

It may be objected that any such approach might subject persons and groups to the consequence of government by a statute that may later be found unconstitutional. Furthermore, a decision that upholds a statute, even provisionally, can be taken as an imprimatur, and runs the risk of deterring reconsideration. But if the experience that is provided by life under the statute puts a different cast on matters, there can be reconsideration in declaratory judgment form without the need for violation and exposure. And if the initial ruling clearly depicts the underlying findings and assumptions, it more clearly invites reexamination when appropriate.

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[201] The Supreme Court has indicated that the "presumption of constitutionality to which every duly enacted state and federal law is entitled" may be applied to laws which structure the political process. Town of Lockport v. Citizens for Community Action at the Local Level, Inc., 430 U.S. 259, 272-73 (1977).

[202] L. LUSKY, BY WHAT RIGHT? (1975).

[203] Childs v. Board of Parole, 511 F.2d 1270, 1286 (1974) (Leventhal, J., concurring). In Clark v. Valeo, No. 76-1825 (D.C. Cir. Jan 21, 1977) (en banc), *aff'd mem. sub nom.* Clark v. Kimmitt, 97 S. Ct. 2667 (1977), the court dismissed the action of Ramsey Clark, then having standing only as a voter, challenging the validity of the provision of the Federal Election Campaign Act whereby regulations of the Federal Election Commission fail to become operative if either House of Congress disapproves. The court's opinion stresses lack of ripeness. My concurrence, seeking to avoid the constitutional implications of the ripeness doctrine, stresses the prudential considerations available to withhold a ruling under the Declaratory Judgment Act.

[204] Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973).

[205] *Compare* Block v. Hirsh, 256 U.S. 135 (1921) (upholding District of Columbia Rent Control law in light of emergency shortage caused by World War I) *with* Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) (admitting possibility that District of Columbia law may have become unconstitutional by virtue of disappearance of original emergency). *Compare* Fry v. United States, 421 U.S. 542 (1975) (upholding federal wage controls for state employees as an emergency measure) *with* National League of Cities v. Usery, 426 U.S. 833 (1976) (striking down federal minimum wa[illegible] as applied to state and local government employees engaged in traditional governmen[illegible]ons).

First amendment cases may call for some expedition to avoid a "chilling" effect of a statute regulating the content or delivery of speech, but these considerations would be offset in a case, such as the political process cases we are discussing, where there were conflicting first amendment interests.

Judgment is necessarily involved in considering whether the nature of the statute stamps it as patently invalid. When there are substantial questions, a modest delay to permit informed and balanced appraisal is not in derogation but in furtherance of soundest judicial doctrine. That doctrine, indeed, was stated in the *Red Lion* decision,[206] when the Court announced at the start that it was upholding the fairness doctrine for radio and television broadcasting but would reconsider the issue of validity in the light of subsequent experience.

C. *Prudential Court Deferral*

Declaratory judgments have been used by the Court to expedite decision when the constitutional question is considered clear and the case important. When the statute is upheld, attack may be renewed in the light of experience. Declaratory judgments are also appropriate in cases where the questions are such that delay cannot produce pertinent experience.[207] Perhaps that explains why the *Buckley* opinion reaches out to make a ruling on the invalidity of the structure of the Federal Elections Commission with respect to issuing implementing regulations, a question that had not been "ripened" by the issuance of any regulation that was protested by plaintiffs.

Declaratory judgments are wisely used to give early protection to important constitutional rights. But they must be used with care lest the existence of a procedure unduly expand the scope of the alleged right, and of vindication at the expense of undue interference. In cases involving conflicting constitutional concerns, there is room for a wait-and-see approach that corresponds in some respects with the prudential philosophy often used by the Court to avoid a hasty decision, on a sketchy record, on questions of public importance.[208]

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[206] *See* Red Lion Broadcasting v. FCC, 395 U.S. 367, 393 (1969).

[207] Powell v. McCormack, 395 U.S. 486 (1969) may be such a case.

[208] *See* Public Affairs Press v. Rickover, 369 U.S. 111 (1962); Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 568-74 (1947).

A further reason for deferring to legislative judgments about the political process—at least in the absence of concrete experience—is that judges often lack current personal experience with problems of political organization. The need for "play in the joints" of the political structure has been recognized as both a necessity and a value, even when it cannot be reconciled symmetrically with all first principles.[209]

In matters of political structure and process. the judges properly give deference to legislators whose work requires them to be in the thick of active political engagement. For when judges, particularly those appointed for life, come to questions of political process, they almost by definition do not have the benefit of current experience.[210] By deferring a preclusive decision on a political process question until statutory experience can accumulate, judges can develop a basis for informed decision-making.

The wait-and-see attitude is particularly appropriate where, as here, the legislature has been engaged in a reform of its process in large part responding to public groups and public perceptions following the Watergate revelations. One may be skeptical of legislation denominated as "reform," for every change can be so dubbed. The purpose may be disguised, or alloyed, and even if it is genuine the skeptic keeps an ironies file of reforms gone awry in practice. Nevertheless, widespread public advocacy of a restructuring of the political process is meaningful evidence that the changes made were not intended solely to benefit incumbents.

There may also be skepticism as to whether wealth can be severed meaningfully from power. But the prospect that reforms will be ineffective in practice is already a prediction, and this is a matter appropriately assigned to experience and not speculation. After all, there are reforms that have worked.[211]

D. *Retained Role of Courts*

While in the absence of experience some deference to legislative judgments about the political process is appropriate. the nature of our constitutional scheme demands that legislation dealing with the political process—even reform legislation—receive careful judicial scrutiny.

These principles have specific application even when legislative measures are not directed at a "discrete and insular" minority: if, to put it crudely, the law appears overall to be a measure for keeping the "ins" in and the "outs" out. the courts should strike it down.

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[209] Holmes. J., *quoted in* Reynolds v. Sims. 377 U.S. 533. 577 (1964); Walz v. Tax Comm'n of the City of New York. 397 U.S. 664. 669 (1970) (Burger, C.J.).

[210] In 1916 Felix Frankfurter observed that Charles Evans Hughes. although a former governor. was waging a commonplace political campaign that was utterly lacking in distinction. a condition that he thought was in part due to the different nature of the intervening assignment on the Supreme Court where he had served with distinction. *See* L.C. ROSENFIELD. PORTRAIT OF A PHILOSOPHER 247-48 (1962).

[211] The secret ballot is one example. When introduced in the United States in the 19th century it was derided as a measure of cowardice. one that had had to be withdrawn in Rome.

In like manner, the courts could and should be vigilant to strike at ceilings so low as to be tantamount to a barrier to political communication. Thus, the *Buckley* Court's observation that the $1,000 limit on independent expenditures operated to prohibit a quarter-page advertisement in a major metropolitan newspaper[212] was an important one, and might have provided a much less preclusive ground than that ultimately relied upon[213] for striking down this particular expenditure limit.

The argument that the 1974 law was intended to protect incumbents may have been more persuasive with the Supreme Court than appears from the *Buckley* opinion. The point was driven home in oral argument. The transcript suggests to me that Professor Ralph Winter, arguing for *Buckley* plaintiffs, was more effective before the Supreme Court than before the District of Columbia Circuit, and doubtless sharpened his claws on the opinion of the court of appeals. He was particularly eloquent on rebuttal[214] when he pointed out that the ceilings for expenditures in House campaigns were reduced from $90,000 to $70,000, that Common Cause representatives said that a lower figure would virtually guarantee reelection of incumbents, and that the Senate did not remonstrate with the House conferees, headed by Mr. Wayne Hays. Winter quoted one congressman as saying that of course they would line up "any time they could vote for what they call reform and freeze out opponents at the same time." A Justice asked if there was no serious effort to move against corruption. He replied: Arguably, as to the limit on contributions. Not at all, as to the limit on expenditures. This was only cosmetic legislation. He punctuated the point by noting that the congressmen had refused to accept Senator Scott's suggestion for limiting the advantage of the postal frank, even in the short period before election—when the focus is on campaigns and not on Congress. And finally counsel hammered home that the provision permitting excess funds in office accounts, which the Act permitted to be used for "any lawful purpose," could, with the indulgence of the Federal Elections Commission, be used for entertainment of constituents.[215] This was the closing note before the bell sounded, and it resonated. The Supreme Court opinion refers to the possibility of the office accounts loophole as one that undercuts whatever role the expenditure limit might have played in enforcing contribution ceilings.[216]

Doctrine teaches that what one or two congressmen say cannot be used to impeach a law.[217] But it packs a punch—and rightly so, for there is undoubted wisdom, as in the *Carolene Products* analysis,[218] in denying the presumption for, and insisting on strict scrutiny of, any measure that tends to enhance the advantage of incumbency.[219] But that would result in a ruling on amount, not on total prohibition, and the suspect amount could be reconsidered and supported or extended.

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[212] 424 U.S. at 40.

[213] *See* text accompanying notes 105-107 *supra*.

[214] Transcript of Argument at 100ff.

[215] *Id.* at 110.

[216] 424 U.S. at 56.

[217] United States v. O'Brien, 391 U.S. 367, 382-84 (1968). *See also* Arizona v. California, 283 U.S. 423, 455 (1931).

The thrust of Professor Winter's argument was heightened by the brief signed by Solicitor General Bork, his former academic colleague, entitled Brief for the United States as Amicus Curiae. That amicus brief was presented as setting forth the views of the United States "as amicus curiae in the true sense of that phrase"—by analyzing "the considerations and issues on all sides."[220]

Such a brief had an inescapable impact in downgrading the value of the brief filed by the Solicitor General for the Federal Election Commission, and tilting against its conclusion of constitutionality.[221]

Although the *Buckley* opinion goes far beyond these thrusts, it may be fair in the future, depending on time going by, experience coming in, and the nature of new proposals, to raise again the issue of a ceiling on expenditures, in a provision clearly denominated as severable. Of course, attentive consideration must be given to the need for a figure that would prove ample in the overwhelming bulk of campaigns, and that was not part of a system to freeze out newcomers.

Reexamination would probably be prudent if Congress decides to proceed with a public financing approach, for all or part of the campaign funds of candidates for Congress. But it might serve, even in the absence of public funds, as a basis for sound judicial reconsideration—after a respectful pause, and after taking account of experience.

One major strand of experience under the Act lies in the 1976 history of wealthy candidates—on both sides of the aisle. Perhaps the most conspicuous was Republican Representative H. John Heinz in his successful race for Senator from Pennsylvania, spending an estimated $2.2 million of his own funds, after the collapse of an early attempt to raise money in small contributions, and outspending Representative William Green by an estimated three to one margin. On the Democratic side, John D. Rockefeller IV spent an estimated two million dollars of his own funds in winning the West Virginia primary and general elections for governor. The actual experience includes losers as well as winners, and a host of variables in each contest.[222] Rockefeller sought to defuse the wealth issue—suggesting he is too rich to steal in office. Others campaigned on their poor man integrity. Ironically, the limitation on contributions by others may have put pressure on candidates of modest means to borrow and use their own unrestricted funds. Late filings with the Federal Election Commission showed many candidates going into personal debt in unusual amounts.[223]

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[218] 304 U.S. 144 (1938).

[219] *Compare* 120 CONG. REC. 10561 (1974), which sets forth a memorandum by Professor Winter submitted by Senator Buckley:

> The idea proposed by Common Cause that this is an area in which the Court should properly defer to the expertise of Congress . . . might be considered ludicrous if it were not so seriously made. . . . *The expertise of incumbents is in retaining their incumbency.* Any legislation and particularly legislation which could be turned to the advantage of incumbency so easily should be scrutinized with the greatest of care.

(Emphasis added.)

[220] Brief for the Attorney General as Appellee and for the United States as Amicus Curiae at 2.

[221] This discussion is not intended to challenge the propriety of separate briefs for different divisions of the Justice Department; or to consider whether and in what circumstances different briefs should be filed by the Solicitor General and Attorney General, as is sometimes done in Great Britain (where, however, the offices stand in quite a different relationship).

The issue has many ramifications. One thing seems clear: it will not disappear back into the bottle.

Lest there be any misunderstanding, it is certainly not suggested here that the wealth of a candidate constitutes an evil. Quite the contrary: Jay Rockefeller's point is not frivolous, and rich candidates and officials are often free of destructive personal anxieties. On the other hand, wealth is no guarantee of wisdom or judgment; plutocracy embraces the vulgar and self-centered; and the concern for standards that marks the English "gentleman" is not dependent on wealth. In any event, the issue is not an exercise in abstract philosophy, but the capability of a democratic people to retain the essential attributes of freedom while seeking modulated expansion of the equality principle and a corollary access.[224]

In the event of any reconsideration of spending limits for presidential candidates, and perhaps for congressmen, the experience of the 1976 presidential candidates who accepted spending limits together with public financing will merit examination. The difference in position between a candidate who obtains public funding at the same time as he is subject to expenditure ceilings and one who does not have this outside aid is sufficiently great so that this could hardly be considered a controlled experiment. Still, there may be useful wisdom as to whether or to what extent the spending limitations reduced the issues discussed, and whether, on any fair projection, the candidates had full opportunity to reach the voters—so that what is involved might be deemed a matter of degree and adjustment, rather than basic principle.[225]

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222. *See* Pincus, *Big Spending Doesn't Assure Victory, Rich Find*, Washington Post, Nov. 4, 1976, at A21, col. 3.

223. Pincus, *Court Campaign Law Ruling Aiding Wealthy Candidates*, Washington Post, Nov. 1, 1976, at A2, col. 4 (noting, for example, William Green's borrowing $75,000 to counter the Heinz spending).

224. Closely related to the strict libertarian is the market theorist: Let there be unbridled freedom in content and volume of ideas, and under competition in the market, the best will prevail. The free market is an enhancing principle, and has undoubted vitality in assuring access of all views (although here, it may be noted, the Court has resisted the logic of free rein for smut). But precepts that stand for most cases do not extend to extremes, and a society does not lose its essential freedom by refusing to accept market liberty as an absolute.

225. N.Y. Times, Nov. 2, 1976, at 29, col. 2 ("The voters do not lack for information").

That is not to say that the candidates would not have spent more money had such been available. Some newspaper columnists called attention to the reduction in physical paraphernalia, bumper stickers, billboards and buttons, pamphlets and placards, in the 1976 campaign as contrasted with prior years, and suggested that the fund limitation curtailed interest of the voter, by decreasing the modern equivalents of torchlight parades.[226]

Bumper stickers and buttons have their significance, but should not be overemphasized. Indeed, when Congress initially passed expenditure limitations, some of the speeches derided the artificial excitement of political saturnalias.[227] In any event, expenditure limitations are not prohibitions, but merely call for allocations in terms of priorities. Candidates have their choice of means of communication and stimulation. As for 1976, the presidential debates and close polls conjoined with voter perception of issues and personalities to bring out more voters than had been anticipated. There have been calls for increasing the amounts of funds available for expenditure.[228] But this does not impeach the equal limitations principle.

E. *Procedure Under the Federal Election Campaign Act*

Meanwhile other problems of constitutionality will arise. Lurking in the wings are issues of treatment of unions and corporations; differences between established committees and ad hoc ideology groups.

The present statute governs these constitutional contests with a most unusual procedure. It requires a district court in which constitutional questions are raised to certify those questions at once to the circuit court of appeals for determination en banc. There is appeal as of right to the Supreme Court, for expeditious determination.[229]

The 1975 situation led to almost frenzied activity in our court. And it is a matter of common knowledge that the 1975 term of the Supreme Court, which ran extremely late, was almost capsized by the *Buckley* litigation. Twenty-seven questions were certified, and although a few were considered unripe, most were answered. Intellectual dexterity, like that required for blindfold chess, was called for just to keep in mind the impact of one ruling on another.

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[226] Weaver, *Experts Say Campaign Law Had Big Election Impact*, N.Y. Times, Nov. 12, 1976, at 1, col. 2; Broder, *The Story of Sanitized Fund Raising*, Washington Post, Oct. 16, 1976, at A15, col. 2.

[227] *E.g.*, 47 CONG. REC. 3011 (1911) (remarks of Sen. Owen):

> I understand perfectly well that men of the best intentions may use money on a large scale for publicity during a campaign in having brass bands and flambeau torchlight processions and in buying uniforms for a thousand men at a time to stir up enthusiasms. It is a very bad practice. It is bogus; it is mischievous; it has a bad effect upon the public mind. It causes a large expenditure of money . . . .
>
> It would be far better to give no such artificial and grossly unfair advantage to a rich candidate over a poor candidate.

[228] *E.g.*, Wicker, *Improving the Next Campaign*, N.Y. Times, Nov. 2, 1976, at 29, col. 1 ("Next time, the subsidy ought to be increased or combined with private fundraising, with perhaps some practical upper limit set on spending").

[229] 2 U.S.C. § 437h (Supp. V 1975).

While not transcending constitutional limitations, the entire procedure placed the courts in a role resembling that of a super-legislature. The plaintiffs even resisted any kind of record-making procedure. They viewed the questions as governed by abstract principles. Our circuit insisted on a remand for expeditious record development and findings.[230]

The procedure specified in the statute was inserted on the floor by Senator James Buckley as part of an amendment to remove the limitation on expenditures, which he regarded as clearly unconstitutional. He raised the first amendment questions, urging the legislature "not to be swept into enacting legislation . . . that will most assuredly be found to be unconstitutional once its key provisions are tested."[231] Although his motion to remove the expenditure limit was defeated, another provision was added as a modification "that I am sure will prove acceptable to the managers of the bill. . . . I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest time."[232]

Thus this procedure had the avowed purpose of expediting a constitutional determination of the key provisions of the bill. The benefit of expedition is one thing. But the straitjacket of the particular procedure, more like a headlong gallop than a brisk canter, was not debated by Congress. There is wisdom in removing that unusual procedure from the law. The system bypasses the benefit of a record-making procedure, and while this could be recaptured in part by the kind of remand used by the District of Columbia Circuit, even this was trial by rapid-fire combat, under the gun of a legislative call for haste. The use of certified questions on an expedited basis encourages an abstract approach to constitutional decision-making—the kind of approach which proved unworkable in the reapportionment context.[233]

As for en banc hearings, these, if anything, tend to be counterproductive in terms of expedition. Appellate courts like the United States courts of appeals, which are accustomed to working in small panels, have difficulty in expediting their en banc determinations. The ingenuity of counsel in articulating constitutional questions lends itself to minor, perhaps frivolous issues, and the instruction for compulsory appellate jurisdiction of the Supreme Court is contrary to all recent studies and thinking concerning that Court.[234]

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[230] Buckley v. Valeo, 519 F.2d 817 (D.C. Cir. 1975) (per curiam).

[231] 120 CONG. REC. 10562 (1974) (remarks of Sen. Buckley).

[232] *Id.*

[233] *See* text accompanying notes 11-64 *supra*.

[234] *E.g.*, FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT 25-38 (1972) (the "Freund Committee" Report). *See also Proposed Revision of Appellate System*, 67 F.R.D. 195, 397 (1975) (views of the Chief Justice).

Students of judicial administration have come to the conclusion that Congress should reconsider mandates to expedite, and leave the matter to the sound judgment of the courts.[235] Experience shows that while Congress calls for expedition having some questions in mind, what ensues is a need to handle questions that the statutes sweep in but which do not merit expedition, and would not be expedited by the congressmen if they had the particular choices to make.

Expedition should be an objective in important cases, of course, but it should not triumph over the need for appraisal of the issues on a full and adequate record. Out of rush for expedition, one may wind up prompting dogmatic rather than pragmatic rulings.

This identifies what happened in the Supreme Court when New York passed the Feinberg Law in 1949 to eliminate "subversives from the public school system."[236] At first, the teachers pushed their appeal on a complaint that attacked the law before it had been implemented. In the *Adler* case,[237] there were opinions by the majority upholding the law as not unduly vague in its provision for listing of subversive organizations, and in its prescription that membership in such organizations was prima facie evidence of disqualification. This broad and abstract ruling of the majority was matched by a broad and abstract dissent, by Justices Black and Douglas, arguing that the state cannot vest its officials with power to select for others either their ideas or organizations. Only Justice Frankfurter was concerned that the case "comes here on the bare bones" of the law, "only partly given flesh" by Regents' Rules.[238] He invoked the doctrine against deciding "merely abstract or speculative issues."[239]

Fifteen years later, in the *Keyishian* opinion,[240] other provisions of the law were struck down as unconstitutionally vague. The Court had before it specific instructors dismissed, and a pattern of board rules and regulations that it characterized as follows: The "intricate administrative machinery for its enforcement [of the complicated plan]" and "the uncertainty as to the scope of its proscriptions make it a highly efficient in terrorem mechanism."[241] The Court found the Act violated the first amendment's special concern for academic freedom, and had "a stifling effect on the 'free play of the spirit which all teachers ought especially to cultivate and practice.' "[242]

The difference between the assumptions as to how statutes will work in practice and the realization of how they have come to work in fact is thus a basis not only for reconsidering rulings already made but for deferring the initial ruling.

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[235] ABA. SPECIAL COMM. ON COORDINATION OF JUDICIAL IMPROVEMENT, REPORTS TO THE HOUSE OF DELEGATES (1977).
[236] N.Y. EDUC. LAW § 3022 (McKinney 1949).
[237] Adler v. Board of Educ., 342 U.S. 485 (1952).
[238] *Id.* at 500 (Frankfurter, J., dissenting).
[239] *Id.* at 498.
[240] Keyishian v. Board of Regents, 385 U.S. 589 (1967).
[241] *Id.* at 601.
[242] *Id.*

Prudential doctrines of deferral are available, in my view, even under the Federal Election Campaign Act as written, for requirements of procedure should not be understood as undercutting fundamentals of the judicial process.[243] The district court's duty to certify constitutional questions forthwith to the circuit court of appeals was properly construed as permitting the circuit court to remand for evidence and findings where appropriate to decision.[244] This was noted by the Supreme Court, without disapproval.[245]

The call for expedition is properly construed as advancing the case on the court's calendar, and not as requiring the court to rush to decision before it is ready. Still, these "hurry up" procedures left on the books tend to discourage, and may even hinder, judicial and judicious pragmatism in decision-making.

CONCLUSION

New political structures and processes are needed for our dynamic society. It is the genius of the American system that it makes changes incrementally, rather than in response to some grand philosophic overhaul. The changes that have been made and will be made must be tested for constitutional soundness. But the testing should reflect experience, and the questions should not be rushed pell mell to judgment.

The courts should not shrink from entering political thickets when necessary to correct injustice, and they will not. But they should not plunge ahead blindly. The biblical ram that got its horns caught in the thicket was sacrificed. That was a noble step forward for mankind, as the Old Testament taught the use of animals to replace human sacrifice. But today's thickets require no judicial sacrifice. How should courts proceed in political thickets? Carefully; pragmatically.

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[243] *See* Clark v. Valeo, No. 76-1825 (D.C. Cir. Jan. 21, 1977) (en banc), *aff'd mem. sub nom.* Clark v. Kimmitt, 97 S. Ct. 2667 (1977) (concurring opinion of Leventhal, J., slip op. at 8-10).

[244] Buckley v. Valeo, 519 F.2d 817 (D.C. Cir. 1975).

[245] Buckley v. Valeo, 424 U.S. 1, 9 (1976).

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Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*

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In the name of the very first amendment in our Bill of Rights, the present Supreme Court has put serious obstacles in the path of our society's advancement toward political equality through law. In two vitally important and, in my judgment, tragically misguided first amendment decisions, *Buckley v. Valeo*[1] and *First National Bank of Boston v. Bellotti*,[2] the Court has given protection to the polluting effect of money in election campaigns. As a result, our political system may not use some of its most powerful defenses against electoral inequalities. Concentrated wealth, often channeled through political action committees, threatens to distort political campaigns and referenda. The voices of individual citizens are being drowned out in election campaigns—the forum for the political deliberations of our people. If the ideal of equality is trampled there, the principle of "one person, one vote," the cornerstone of our democracy, becomes a hollow mockery.

Buckley and *Bellotti* create an artificial opposition between liberty and equality. The first amendment tradition of leading cases and scholarly writings shows that the ideals of political equality and individual participation are essential to a proper understanding of the first amendment. Campaign spending reform is imperative to serve the purposes of freedom of expression. Within the confines of *Buckley* and *Bellotti*, only limited reforms are permissible. More effective measures will be possible only if the Court reconsiders these unfortunate precedents.

I. MONEY AND THE POLLUTION OF POLITICS

The corrosive effect of money on the political process is not new to this country or to the modern era,[3] but the problem of money in politics has taken on a new urgency in the American politics of the 1980's. The development of communications technology and campaign techniques has made the political impact of money even more potent and the political consequences of meager financial resources even more devastating. Financial inequalities pose a pervasive and growing threat to the principle of "one person, one vote," and undermine the political proposition to which this nation is dedicated—that all men are created equal.

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[1] 424 U.S. 1 (1976).

[2] 435 U.S. 765 (1978).

[3] See L. Berg, H. Hahn & J. Schmidhauser, Corruption in the American Political System 14-21 (1976) (background of corruption in America); Leventhal, Courts and Political Thickets, 77 Colum. L. Rev. 345, 362-65 (1977) (history of corrupt practices legislation).

A. *The Legal Framework*

In the early 1970's, the Watergate scandals gave impetus to popular demand for strong measures to purify the political process,[4] culminating in 1974 with the passage of the Federal Election Campaign Act.[5] The legislation adopted contribution limits,[6] comprehensive spending limits,[7] and public financing of presidential campaigns.[8] It created a new federal agency[9] to enforce these laws and to supervise campaign finance reporting and disclosure.[10] It did not, however, establish a system of public funding for House and Senate elections,[11] missing a golden opportunity, not since recaptured, to diminish the influence of money in congressional politics.

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[4] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (1976 & Supp. IV 1980)) had required comprehensive disclosure of contributions to and expenditures by federal candidates. Id. §§ 301-311, 86 Stat. at 11-19. It also had imposed per-voter limits on media expenditures by candidates. Id. § 104, 86 Stat. at 5-7. These partial reform measures had failed to avert the Watergate abuses.

The Ervin committee was formed to investigate campaign finance practices and to propose reform measures. See Final Report of the Senate Select Committee on Presidential Campaign Activities of the United States Senate, S. Rep. No. 981, 93d Cong., 2d Sess. (1974). Extensive hearings were held in 1972 by three congressional committees. See Federal Election Reform: Hearings Before the Subcomm. on Elections of the House Comm. on House Administration, 93d Cong., 1st Sess. (1973); Federal Election Reform, 1973: Hearings before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 93d Cong., 1st Sess. (1973); Federal Election Campaign Act of 1973: Hearings on S. 372 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 93d Cong., 1st Sess. (1973).

[5] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431-455 (1976 & Supp. IV 1980)). The House committee report on the Act declared:

> The unchecked rise in campaign expenditures, coupled with the absence of limitations on contributions and expenditures, has increased the dependence of candidates on special interest groups and large contributors. Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign.

H.R. Rep. No. 1239, 93d Cong., 2d Sess. 3 (1974).

[6] Congress placed limits on the annual amounts that any individual or committee could contribute to any candidate, in order to reduce the opportunity for corruption and undue influence and the appearance of corruption inherent in massive private campaign contributions. 18 U.S.C. §§ 608(b)(1)-(3) (Supp. IV 1974) (current version at 2 U.S.C. §§ 441a(a)(1)-(3) (1976)).

[7] The Act limited the overall amount of campaign expenditures by each candidate, with differing ceilings for House, Senate, and presidential candidates. 18 U.S.C. § 608(c) (Supp. IV 1974) (repealed 1976). It also imposed a separate limit on the amount that a candidate could legally spend from personal or family resources. Id. § 608(a) (repealed 1976). To enforce the contribution and expenditure limits, the law placed a ceiling on the amount of independent expenditures that could be made by any person or committee on behalf of or against a specifically identified candidate for federal office. Id. § 608(e) (repealed 1976).

[8] Congress adopted a system of partial public financing for primaries and conventions and complete public financing for the general election campaign. Id. §§ 403-408 (current version at 26 U.S.C. §§ 9001-9042 (1976)).

[9] 2 U.S.C. § 437c (1976 & Supp. IV 1980) (powers of Federal Election Commission).

Because it did not reach congressional campaign financing, the 1974 Act did not go far enough. But in the 1976 decision of *Buckley v. Valeo*,[12] upholding parts of the 1974 Act but striking down other basic provisions, the Supreme Court decided that the legislation had gone too far. The Court accepted public financing of presidential elections[13] and held that Congress could constitutionally attach conditions—including spending limits—to the acceptance of those funds.[14] It also approved of the reporting and disclosure requirements for all federal candidates and committees,[15] and agreed that ceilings on campaign contributions were justified by the need to prevent corruption and the appearance of corruption.[16] The *Buckley* decision gutted vital portions of the legislation, however. Equating spending with speech,[17] the Court treated the first amendment as a near-absolute in the sphere of political debate.[18] It unequivocally struck down the Act's limits on overall campaign spending by a candidate who does not receive public financing, restrictions on independent expenditures in support of or against a candidate, and ceilings on candidate spending from personal or family funds.[19] The

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[10] The 1971 Act had established extensive reporting and disclosure requirements for candidates and committees, including periodic reports of the sources and amounts of contributions and expenditures. 86 Stat. 3, 11-19 (1972) (current version at 2 U.S.C. § 434 (Supp. IV 1980)).

[11] On April 11, 1974, the Senate passed a bill providing for public financing of congressional election campaigns by a vote of 53-32. 120 Cong. Rec. 10,952 (1974); see S. Rep. No. 689, 93d Cong., 2d Sess. 4-15, reprinted in 1974 U.S. Code Cong. & Ad. News 5587, 5590-96 ("it is clear to us that contribution and expenditure limits which would check excessive influence of great wealth cannot be effectively and fairly implemented without a comprehensive system of public campaign financing").

The House, however, defeated a public financing proposal for congressional campaigns by a vote of 228-187. 120 Cong. Rec. 27,495-96 (1974). In conference, the measure was deleted from the Federal Election Campaign Act of 1974. H.R. Rep. No. 1438, 93d Cong., 2d Sess. 109-10, reprinted in 1974 U.S. Code Cong. & Ad. News 5618, 5685-86 (conference report).

[12] 424 U.S. 1 (1976).

[13] Id. at 85-109. The Court cited Congress's goals of reducing the deleterious influence of large contributions, facilitating communication by candidates with the electorate, and freeing candidates from the rigors of fundraising. Id. at 95-96. Six of the eight participating Justices fully joined in this holding. Justices Burger and Rehnquist dissented from this holding in whole or in part. Id. at 235 (Burger, C.J., concurring and dissenting in part), 290 (Rehnquist, J., concurring and dissenting in part).

[14] Id. at 108-09.

[15] Id. at 60-84.

[16] Id. at 23-38. Six Justices agreed; Justices Burger and Blackmun dissented. Id. at 235 (Burger, C.J., concurring and dissenting in part), 290 (Blackmun, J., concurring and dissenting in part).

[17] In a previous article, I examined the flaws in the Court's conclusion that money is speech. See Wright, Politics and the Constitution: Is Money Speech?, 85 Yale L.J. 1001 (1976).

[18] My late colleague Harold Leventhal has pointed out the striking difference in approach between the Court's "pragmatic tone, experimental outlook, and fact-and-record oriented discussion" in the sections upholding Federal Election Campaign Act provisions and the absolutist perspective of the Court's discussion of the unconstitutionality of expenditure limits. Leventhal, supra note 3, at 358; see id. at 373 ("This sweeping pronouncement begs the question by a pejorative statement of the equality principle.").

[19] 424 U.S. at 39-59.

Court in *Buckley* insisted that "the concept that government may restrict the speech [i.e., spending] of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment."[20]

Justice White, who had practical experience in nationwide campaigning in 1960 as coordinator of John Kennedy's preconvention campaign in Colorado and then as head of National Citizens for Kennedy, was the sole member of the Court to disagree with the Court's holding that expenditure limits violate the first amendment.[21] He rejected the Court's contention that money is speech. Writing with an apparent touch of sarcasm, he observed, "[A]s it should be unnecessary to point out, money is not always equivalent to or used for speech, even in the context of political campaigns."[22] In his view, expenditure ceilings reinforced the contribution limits and helped "eradicate the hazard of corruption."[23] He took judicial notice that

> [t]here are many illegal ways of spending money to influence elections. One would be blind to history to deny that unlimited money tempts people to spend it on *whatever* money can buy to influence an election. On the assumption that financing illegal activities is low on the campaign organization's priority list, the expenditure limits could play a substantial role in preventing unethical practices. There just would not be enough of "that kind of money" to go around.[24]

Like the congressmen and senators—presumably more knowledgeable than most about corruption in politics—who passed the 1974 Act, and unlike the other Justices, Justice White recognized and understood the realities of political campaigns.

Two years after *Buckley*, the Court again repudiated the goal of political equality in *First National Bank of Boston v. Bellotti*.[25] Trying to prevent one-sided corporate messages from swamping referendum campaigns, Massachusetts had enacted a statute prohibiting corporate expenditures on statewide referendum issues not directly related to a corporation's business interests. The Supreme Court, however, struck down the statute, relying on *Buckley*'s facile equation of spending and speech, and insisting that there was no possibility of corruption in a referendum campaign.[26] The Court thereby effectively declared open season for the influence of concentrated wealth upon initiative and referendum campaigns.[27]

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[20] Id. at 48-49. This passage has been quoted by the Court in several subsequent cases. See infra note 138.

[21] Id. at 257-66. Justice White would have accepted Congress's judgment that limitations on independent expenditures and overall candidate spending are necessary to "counter the corrosive effects of money in federal election campaigns," observing that Congress "undeniably included many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." Id. at 260-61.

[22] Id. at 263.

[23] Id. at 264.

[24] Id. at 265.

[25] 435 U.S. 765 (1978).

[26] Id. at 784-92.

[27] This term the Court reversed a decision by the Supreme Court of California that had upheld a Berkeley city ordinance forbidding more than $ 250 in contributions by any individual to

In my view, these two decisions—though they quote the landmarks of our first amendment heritage—enunciated principles that are, to borrow the words of the *Buckley* Court, "wholly foreign to the First Amendment."[28] The two decisions have also had a direct, significant, and pernicious impact on political campaigning in America.[29]

The federal campaign reform provisions that survived *Buckley v. Valeo* have worked well. The disclosure and reporting requirements allow citizens and the press to discover the sources of a candidate's financial backing.[30] Public financing of presidential campaigns has relieved candidates of much of the draining, demeaning, and obligation-creating task of begging for funds from large contributors. At the same time, the limits on spending by candidates who accept financing are sufficiently high to allow ample discussion of the issues.[31]

A similar program for congressional campaigns would also pass judicial muster, but so far, despite strenous efforts by reformers, Congress has been unwilling to extend public financing to House and Senate campaigns.[32] Money continues to infect House and Senate races, campaigns for state and local offices, and referendum and initiative voting. In these political contests,

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a committee formed to support or oppose a ballot measure. Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434 (1981), rev'g 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980). The decision by the United States Supreme Court relied on *Bellotti*'s premise that the problem of corruption cannot possibly arise in a popular vote on a public issue, and on *Buckley*'s insistence that government may not restrict the speech of some elements of our society in order to enhance the relative voices of others.

[28] 424 U.S. at 48-49. See infra text accompanying notes 138-98 for a discussion of these cases from the perspective of first amendment theory and precedent.

[29] That impact was recently reinforced in Common Cause v. Schmitt, 102 S. Ct. 1266 (1982). The Supreme Court, by a four-four vote, let stand a three-judge district court decision holding that the first amendment prohibits limits on independent expenditures for the benefit of any presidential candidate, even if he accepts federal funding. The 1974 Act still precludes a general election candidate who receives federal funding from accepting private contributions. 26 U.S.C. § 9003(b) (1976). But by allowing candidates to benefit from unlimited "independent" spending, the district court's decision, affirmed by the Supreme Court, thwarts Congress's attempt to assure major party presidential candidates equal financial resources in the general election. See Claude & Kirchhoff, The "Free Market" of Ideas, Independent Expenditures, and Influence, 57 N.D. L. Rev. 337, 364-65 (1981) (multimillion dollar war chests raised and spent by independent committees subvert intent of Congress and have potential for creating implicit obligations).

[30] Arterton, The Federal Election Commission, *in* Campaign Finance Study Group, Institute of Politics, John F. Kennedy School of Government, Harvard University, An Analysis of the Impact of the Federal Election Campaign Act, 1972-78, at 1-24 to 1-25, 6-5 to 6-8 (1979) [hereinafter cited as Harvard Campaign Finance Study].

[31] F. Wertheimer & R. Huwa, Campaign Finance Reforms: Past Accomplishments, Future Challenges 5 (unpublished paper presented at Colloquium on Election Law in the 80's, sponsored by New York University Review of Law and Social Policy, New York, Nov. 15, 1980).

[32] In 1977 proposed legislation to establish a voluntary system of matching federal grants to House and Senate candidates was blocked by a filibuster in the Senate and by opposition in the House Administration Committee. In 1978, despite two attempts to attach the measure to related election law legislation, supporters of public financing of congressional campaigns were unable to obtain consideration of the bill on the floor of the House. Again in 1979, the legislation was blocked in the House when a bill covering House elections was rejected by the House Administration Committee by a vote of 8-17. See 5 Congressional Quarterly, Congress and the Nation, 1977-1980, at 943-47 (1981).

democracy is often shadowed by lopsided inequalities in campaign resources. The predominance of money comes at the expense of the ideals of liberty and equality that underlie our political system.

B. *Political Action Committees*

Political Action Committees (PAC's), perhaps the fastest-growing phenomenon in modern American politics, epitomize the contemporary threat to electoral integrity. The stark reality of PAC's is that they bring the power of concentrated wealth to bear on office-holders and candidates—national, state, and local—on behalf of special interests. Although only a small fraction of these groups promote particular ideologies or advocate single issues,[33] PAC's generally represent the interests of organizations, such as corporations, labor unions, and trade associations, that are forbidden by law to contribute or spend directly in federal campaigns.[34]

In recent years, PAC's—especially those connected with corporations and trade associations—have grown explosively in numbers and influence. Provisions in the 1974 Act facilitated their formation and operation.[35] In 1974 there were 89 corporate PAC's; now there are 1,327.[36] Between 1976 and 1980 PAC's more than doubled the amounts of money they poured into House and Senate campaigns—$22.6 million in 1976, $35.2 million in 1978, and $55.3 million in 1980.[37] And PAC's are taking on growing importance in the strategies of candidates and their fundraisers.[38] They are rapidly becoming the dominant force among categories of contributors. The PAC component of House candidates' campaign funds has risen steadily from 17% in 1974 to 26.4% in 1980.[39] And PAC's have far outdistanced the federal campaign funding contributions of all national, state, and local political parties combined.[40]

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[33] Only 11.2% of the PAC's that reported making contributions to federal candidates in the 1980 elections were unconnected with another organization; they contributed only 8.4% of the total dollar amount. Federal Election Commission press release (August 4, 1981).

[34] Since 1907, federal law has prohibited the use of corporate treasury money in federal election campaigns. Act of January 26, 1907, ch. 420, 34 Stat. 864 (current version at 2 U.S.C. § 441b (1976 & Supp. IV 1980)). The same prohibition has applied to labor unions continuously since 1947. Labor Management Relations Act, ch. 120, tit. III, 61 Stat. 159 (1947) (current version at 2 U.S.C. § 441b (1976 & Supp. IV 1980)). The law did not prevent unions or corporations from persuading their members or stockholders to contribute to separate political funds segregated from the treasury. Labor unions therefore established an elaborate network of separate funds. See Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 402-09 (1972) (discussing history of the ban on union contributions and expenditures and establishment of CIO Political Action Committee).

[35] In the past, corporations were less active than unions in operating separate political funds, but one major obstacle—a ban on political activity by government contractors—was repealed in 1974. 2 U.S.C. § 441c(b) (1976) (authorizing government contractors to establish separate segregated funds), repealing Pub. L. No. 76-753, § 5(a), 54 Stat. 772 (1940); see 5 Congressional Quarterly, supra note 32, at 948. The 1974 legislation also clarified the limits on solicitation by corporate PAC's. See Mayton, Politics, Money, Coercion, and the Problem with Corporate PACs, 29 Emory L.J. 375 (1980). At the same time, the limits placed on individual and party contributions by the 1974 legislation generated exploration for new sources of campaign funds. Bolton, Constitutional Limitations on Restricting Corporate and Union Political Speech, 22 Ariz. L. Rev. 373, 405-06 (1980); Epstein, The PAC Phenomenon: An Overview, 22 Ariz. L. Rev. 355, 360 (1980). The PAC boom had begun.

Corporate and trade association PAC's now surpass labor PAC's in financial activity by a large margin. In the 1979-80 election cycle, labor union PAC's spent $26.4 million, including $14.1 million in direct contributions to candidates. Corporate PAC's spent $31.8 million, including $21.7 million to candidates, while trade, membership, and health organizations spent an additional $33.6 million, including $17.2 million in candidate contributions. Federal Election Commission press release (August 4, 1981). Experts estimate that approximately half of the PAC's in the latter category are business-related. See Wertheimer, The PAC Phenomenon in American Politics, 22 Ariz. L. Rev. 603, 606 n.19 (1980).

[36] Federal Election Commission press release (January 17, 1982); Washington Post, Jan. 19, 1982, at A7, col. 1. While corporate PAC's have grown rapidly in number, labor union PAC's have remained relatively stable. In 1975 there were 226 labor union PAC's. Brief for Plaintiffs at

While the overall figures are impressive, the patterns of PAC spending make them an even more formidable influence in congressional politics. PAC's concentrate their giving upon strategic categories of candidates—those who are more likely to win and to have useful influence in Congress. PAC's rarely contribute to candidates who lose in the primary,[41] and they donate much more heavily to incumbents than to challengers.[42] In addition, some

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14, International Ass'n of Machinists & Aerospace Workers v. FEC, No. 81-1664 (D.C. Cir. April 6, 1982). By December 1981 the number had grown to only 318. Political Finance/Lobby Reporter, Jan. 20, 1982, at 11. Total union PAC funds grew from $18.5 million in 1976 to $26 million in 1979-80, slower than the increase in the cost of living. Brief for Plaintiffs, supra, at 14.

Despite the recent growth in the number of corporate PAC's, the potential for future growth is immense. A significant number of leading corporations have not yet established their own PAC's. Adamany, PAC's and the Democratic Financing of Politics, 22 Ariz. L. Rev. 569, 589 (1980) (in 1978 only 40% of firms in top 500 had PAC's); Wertheimer, supra note 35, at 607 (only 17% of firms with $100 million or more in assets had formed PAC's by May 1978).

[37] Epstein, supra note 35, at 356; Federal Election Commission press release (August 10, 1981).

[38] The number of House candidates receiving more than $50,000 in PAC money more than tripled from 57 in 1976 to 176 in 1978. Those who received more than $100,000 increased from 3 in 1976 to 21 in 1978. Kenski, Running With and From the PAC, 22 Ariz. L. Rev. 627, 640 n. 71 (1980). In the 1974 campaign, 78 members of the House received 40% or more of their total contributions from PAC's; in 1978 the number was 136. Wertheimer, supra note 35, at 607.

[39] Kenski, supra note 38, at 641-42; Federal Election Commission press release (August 10, 1981).

In Senate campaigns in 1976, PAC's gave 15% of the funds received by candidates—winners and losers, incumbents and challengers together. In 1978 the figure was 13% and in 1980 it was 16%. Kenski, supra note 38, at 641; Federal Election Commission press release, supra.

[40] In the 1977-78 election cycle, the two major parties directly contributed a total of $6.4 million to federal candidates and spent an additional $4.8 million on their behalf. In contrast, during the same election cycle, PAC's gave $35.2 million to federal candidates. Epstein, supra note 35, at 361. A significant shift took place during the 1970's. In 1972, political parties supplied 17.3% of the funds obtained by House candidates, while nonparty committees provided 14.0%. In 1978 parties gave only 4.5% of the funds, nonparty committees 25.3%. Jacobson, The Pattern of Campaign Contributions to Candidates for the U.S. House of Representatives, 1972-1978, *in* Harvard Campaign Finance Study, supra note 30, at 2-2 to 2-3.

Some commentators assert that PAC's have been a major factor in the decline of parties. See, e.g., Epstein, supra note 35, at 360-61; Wertheimer, supra note 35, at 616. Others believe that PAC's have simply benefited from trends that have at the same time reduced party influence on elections. See, e.g., Adamany, supra note 36, at 593-94; Sorauf, Political Parties and Political Action Committees: Two Life Cycles, 22 Ariz. L. Rev. 445, 454 (1980).

[41] In the 1980 election campaign, 93.4% of total PAC contributions went to candidates who contested the general election—$51.7 million out of $55.3 million. Federal Election Commission press release (August 10, 1981).

[42] In 1980 PAC's gave $33.8 million to incumbents, many of them holding safe seats, and only $14.3 million to challengers. Id. In 1978 the largest donor, the American Medical Associa-

PAC's, especially those with ideological or single-issue orientations, spend large sums of money on highly effective campaigns against "hit listed" candidates. Collectively, PAC's devoted more than $14 million in 1980 to independent campaign activities for or against particular candidates.[43] Because *Buckley v. Valeo* constitutionally invalidated ceilings on "independent" expenditures,[44] this type of spending may theoretically be unlimited.

When wealth of this magnitude is injected into the political bloodstream,[45] the legislative process itself is affected. PAC contributions are given with a legislative purpose and it is a telling fact that they are most numerous in the more highly regulated industries, such as oil, transportation, utilities, drugs, health care, and government contracting.[46] High-level corporate employees are solicited to give to the company's PAC precisely because it will advance the business interests of the firm.[47] One PAC formed by a major corporation explained to its employees, "Our aim is to gain for [our] managers the same rapt attention from their Congressmen and Senators which labor leaders now command."[48] Another PAC reported progress in achieving the corporation's goals: "We *have* strengthened our relationships with our 'constituent' Senators and Congressmen . . . . One or more of us on the PAC Steering Committee has developed a personal relationship with each incumbent to whom we give campaign contributions."[49]

The political generosity of the PAC's is directed to legislators who are in a position to help, especially members of committees with jurisdiction over legislation affecting the sponsors. For example, from the beginning of 1975 through mid-1978, dairy PAC's gave $380,000 to members of the House Agriculture Committee, and labor groups donated almost $600,000 to mem-

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tion, gave $823,542 to House incumbents, compared to $301,900 to challengers. Common Cause press release (December 18, 1979). PAC money represented 32% of the total receipts of incumbents in 1978, Wertheimer, supra note 35, at 611, and 33.8% in 1980, Federal Election Commission press release (August 10, 1981).

[43] Federal Election Commission Record, March 1982, at 7. This figure represented approximately 10.5% of total PAC spending. Id. For discussions of independent expenditures in United States Senate campaigns, see N.Y. Times, Nov. 30, 1980, § 1, at 39, col. 1; Washington Post, Nov. 12, 1980, at A10, col. 1.

The Supreme Court, by a four-four vote, recently affirmed a three-judge district court's decision that Congress may not limit the amount of independent expenditures that may be made by persons or committees to support or oppose presidential candidates in the general election. See supra note 29.

[44] 424 U.S. at 39-51.

[45] PAC's are also a growing force in state politics. See Adamany, supra note 36, at 588; Epstein, supra note 35, at 362-63.

[46] Budde, The Practical Role of Corporate PAC's in the Political Process, 22 Ariz. L. Rev. 555, 560 (1980). Coal, oil, and gas interests had 12 registered PAC's in 1974 and 110 in 1978. Utilities had no PAC's in 1974 and 64 in 1978. Banking interests had 36 PAC's in 1974 and 161 in 1978. Wertheimer, supra note 35, at 606; see G. Adams, The Iron Triangle 110-24 (1981) (activities of PAC's formed by defense contractors).

[47] See Findings of Fact and Constitutional Questions for Certification Under 2 U.S.C. § 437(h), findings 4-27, at 8-16, International Ass'n of Machinists & Aerospace Workers v. FEC, No. 80-0354 (D.D.C. filed June 3, 1981).

[48] Id., finding 11, at 11.

[49] Id., finding 19, at 14.

bers of the House Education and Labor Committee.[50] In 1978 PAC's provided 56% of the campaign money spent by 22 House committee chairmen,[51] compared with 25% for House candidates as a whole.[52] The chairman of the House Ways and Means Committee, the committee in which all tax legislation begins, received $157,425 from corporate PAC's to finance his 1980 re-election campaign. He won with 84% of the vote.[53]

Carefully targeted PAC giving has two parallel effects on Congress. First, PAC money, like money from any source, allows a candidate to spend more on his campaign and statistically enhances his chances of winning.[54] Second, once a candidate has been elected, he knows that if he wants to be re-elected it is important to give attention and deference to the views of those who helped him financially.[55] One chairman of a large corporation has said that dialogue with politicians "is a fine thing, but with a little money they hear you better."[56] PAC defenders and critics disagree on which effect is more important for PAC contributors and recipients. PAC champions insist that they simply reward their friends and withhold favors from their adversaries.[57] PAC critics charge that lavish contributions to members of key committees are not rewards for past support but down payments for future influence.[58] It is not important to my analysis to choose between these conflicting positions. In one case PAC's exercise a form of "multiple voting,"[59] and in the other they engage in a form of legalized bribery.

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[50] Wertheimer, supra note 35, at 608. In addition, during that period, health groups contributed over $200,000 to members of the House Commerce Committee, which handles health matters. In 1977 and 1978 alone, banking PAC's gave nearly $225,000 to the members of the House Committee on Banking, Housing, and Urban Affairs. Id. at 608. During the 1980 election cycle, members of the House Ways and Means Committee received $1.73 million from corporate PAC's, including large sums from the steel, auto, airline, and railroad industries, which were seeking special tax breaks. Public Citizen, Congress Watch, Supply-Side Economics: Campaign Contributions to the House Ways and Means Committee, 1979-80, at 6-10 (July 1981); see also Common Cause, Dirty Money . . . Dirty Air? (May 1981) (study of PAC contributions to congressional committees reviewing the Clean Air Act); G. Adams, supra note 46, at 116-18 (patterns of giving by defense contractor PAC's).

[51] Wertheimer, supra note 35, at 608. Senate Finance Committee Chairman Russell Long received $518,000 in PAC money, including $409,000 from corporate and business-related trade association PAC's; Robert Dole, ranking Republican on the same committee, received $328,055 from PAC's, including $255,000 from business or business-related PAC's. PAC's in these categories gave $170,000 to Senator Strom Thurmond, ranking Republican on the Senate Judiciary Committee, and $192,000 to Senator Jake Garn, then ranking Republican on the Senate Banking Committee. Common Cause Guide to Money, Power and Politics in the 97th Congress (1981).

[52] Kenski, supra note 38, at 641-42.

[53] Public Citizen, supra note 50, at 4. Sometimes the legislative purpose of campaign contributions is particularly transparent. In the first six months of 1981, one House election was just over and the next was a full cycle away, but Congress was considering legislation to lower corporate income taxes. Corporate PAC's poured more than $280,000 into the campaign coffers of 24 of the 35 members of the House Ways and Means Committee, most of whom represent safe districts. Five of the six largest recipients had had essentially no primary opposition and had received over two-thirds of the vote in the general election. Public Citizen, Congress Watch, Dealing from a PAC'd Deck: Corporate Campaign Contributions to the House Ways and Means Committee During the First Half of 1981 (Oct. 1981).

[54] By definition, only 50% of major party general election candidates win in contested elections. But almost 80% of the 176 candidates who received at least $50,000 in PAC contributions in the 1978 campaign were winners. Although only 5% of all challengers won nationally, 52% of those who received more than $50,000 in PAC money won the election. Kenski, supra note 38, at 646-48.

[55] See generally G. Adams, supra note 46, at 112; Chevigny, Review Essay: The Paradox of Campaign Finance, 56 N.Y.U. L. Rev. 206, 214 (1981). The Washington Post reported that Representative Phil Gramm, who received $6,200 in contributions from the used car dealers' PAC in 1980, addressed their 1981 annual convention and told them, "Your political action committee was a substantial contributor to my campaign. I can say that without your political action contribution, I would have lost. And without your contribution, I would not have been able to come up with the Gramm-Latta budget." Washington Post, Nov. 22, 1981, at C2, col. 3. In fact, Gramm was engaging in hyperbole; he won the 1980 election by a margin of 70% to 30%. 38 Cong. Q. Weekly Reports 3344 (1980).

Whatever the cause and effect relationship, studies of issue after issue demonstrate that a much higher percentage of legislators who voted with a PAC's position received money from that PAC in the previous campaign than those who voted the other way, and among the beneficiaries of PAC money, those supporting the PAC position had received a substantially higher average contribution. Whether the issue on the floor is the windfall profits tax on oil companies,[60] hospital cost containment,[61] efforts to create a superfund for

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56. Quoted in Ulman, Companies Organize Employees and Holders into a Political Force, Wall St. J., Aug. 15, 1978, at 1, col. 6.

57. See Budde, supra note 46, at 558; Malbin, Of Mountains and Molehills: PAC's, Campaigns, and Public Policy, *in* Parties, Interest Groups, and Campaign Finance Laws 152, 176 (M. Malbin ed. 1980).

58. See, e.g., Wertheimer, supra note 35, at 614-15. PAC critics assert that the voting patterns of freshmen congressmen often conform with the positions of the PAC's that helped to finance their campaigns, and contend that the PAC money could not possibly have served as a reward for past support. In 1979, the National Association of Realtors (NAR) strongly supported a proposal to eliminate HUD enforcement powers against fraudulent real estate developers. In the previous campaign, the NAR had contributed to 51 of the 71 House freshmen; 43 of those 51 sided with the realtors. Of the 20 who opposed the NAR proposal, 13 had received no NAR contributions. Id. at 615.

In 1979 the AMA lobbied strongly against President Carter's hospital cost containment bill, which was defeated. Thirty-seven out of 49 freshmen who received AMA contributions in the 1978 campaign voted with the AMA: they had received average contributions of $9,454. Those who received AMA money but voted against the AMA had received an average of less than half that figure, $4,717 per member. Thirteen of the 25 freshmen who opposed the AMA had received no AMA PAC contributions. AMA Campaign Contributions Helped Kill Hospital Cost Containment Bill, According to Common Cause Study, Common Cause press release (December 18, 1979).

59. See L. Berg, H. Hahn & J. Schmidhauser, supra note 3, at 43-46 (discussing concept of "weighted voting," which recognizes that some persons not only cast their own ballots but exercise a multiplier effect by contributing money to influence the votes of others); Adamany, supra note 36, at 571 ("Money's extreme potential for multiple voting points to an important issue of political finance policy in a democracy: preventing gross inequalities in the meaning of the vote." (footnotes omitted)); id. at 570-71 (noting that ability and inclination to give large sums to political candidates "has greater potential than any other form of political activity for differential participation by presumably equal citizens"); cf. Freund, Commentary, *in* A. Rosenthal, Federal Regulation of Campaign Finance: Some Constitutional Questions 74 (Citizens' Research Foundation Study No. 18, 1971) (large contributors "are operating vicariously through the power of their purse, rather than through the power of their ideas, and . . . I would scale that relatively lower in the hierarchy of First Amendment values").

60. Nader Study Links Oil Contributions to Pro-Oil House Vote, Public Citizen, Congress Watch press release (July 23, 1979) (95% of House members who received more than $2,500 from oil industry PAC's voted to reduce windfall profits tax; three-quarters of the 267 House members who received oil PAC money voted for the measure; 83% of the 236 Congressmen who supported the measure, and only 39% of its opponents, had received oil PAC contributions).

61. AMA Campaign Contributions Helped Kill Hospital Cost Containment Bill, According to Common Cause Study, supra note 58 (202 of 234 House members who voted against Carter

victims of toxic chemicals,[62] or any other legislation that affects powerful, organized interests,[63] PAC money augments interest-group lobbying.

A graphic example of the manner in which interest groups seek political return on their PAC contributions is provided by the lobbying efforts of used car dealers. Their National Automobile Dealers Association was the fourth largest PAC contributor in the country in the 1980 elections, giving slightly more than $1 million to congressional candidates. Used car dealers successfully lobbied for a congressional veto of proposed FTC regulations requiring them to disclose known defects in used cars they offer for sale.[64] At the Association's convention this past fall in Washington D.C., the Association's government relations chairman gave the delegates a pep talk, urging them to go see their Congressman and adding that PAC contributions had opened the door. By the end of the convention, more than ninety House members and more than twenty senators had signed on as co-sponsors of the veto resolution. In another few weeks, thirty-three more representatives and one more senator had joined. About 80% of the legislators on the bandwagon had received PAC contributions in 1980.[65]

Not only do PAC's buy legislative clout by investing in congressional candidates, they also squeeze out the individual voice in congressional politics. PAC's tend to be bureaucratically organized and centralized, often at the national level. The voice of a PAC is not that of its small givers whose participation is extolled by PAC publicists,[66] but that of its leadership, who decide where to bestow the money.[67] National PAC's compete with local constituents for the attention of congressmen,[68] and as the PAC share of

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administration's hospital cost containment legislation received funds from AMA PAC's; bill's opponents received average AMA PAC contributions four times as great as bill's supporters).

[62] Nader Group Links Chemical Contributions to Pro-Industry Efforts, Public Citizen, Congress Watch press release (August 25, 1980) (among top recipients of chemical industry PAC money were several Senators and Representatives leading opposition to superfund bill).

[63] Public Citizen, supra note 50, at 6-10. In a vote on a refundable investment credit for steel, auto, airline, and railroad companies in June 1981, those who voted yes had received an average of $12,420 from corporation and labor PAC's in the affected industries; those who voted present or did not vote received an average of $8,296; and those who voted no received only $3,585. Id. at 10.

[64] The FTC regulations were submitted to Congress for review on September 9, 1981. Veto resolutions were introduced in both the House (H. Con. Res. 178) and the Senate (S. Con. Res. 33). The Senate committee held a hearing on October 30; the House committee held a hearing on December 8. On December 16, 1981, the House committee favorably reported the veto resolution to the floor. Congress adjourned, however, before the completion of action on the proposed veto. Under the terms of the FTC Improvements Act of 1980, the agency was required to resubmit the rule for review at the beginning of the 1982 session. See 15 U.S.C. § 57a-1(a)(2) (Supp. IV 1980). On May 18, 1982, the Senate voted 69-27 to disapprove the FTC regulation. 128 Cong. Rec. S5380-5402 (daily ed. May 18, 1982). On May 26, 1982, the House voted by a margin of 286 to 133 to veto the rule. 128 Cong. Rec. H2856-2883 (daily ed. May 26, 1982).

[65] Can the Used Car Lobby Sell Congress?, Washington Post, Nov. 22, 1981, at C2, col. 3.

[66] See, e.g., Budde, supra note 46, at 556-57; Rhodes, In Response to Obey-Railsback, 22 Ariz. L. Rev. 670, 670-71 (1980).

[67] Mayton, supra note 35, at 391.

[68] Adamany, supra note 36, at 596; Campaign Finance Study Group, Summary of Findings and Major Recommendations, *in* Harvard Campaign Finance Study, supra note 30, at 1-8; Kenski, supra note 38, at 639; Mayton, supra note 35, at 386-87. As the Harvard study warned, "Candidates now rely more heavily on money from outside their districts or states. As Washing-

candidate funding increases, local voices and constituent concerns are bound to carry less weight.

C. *Spiraling Campaign Costs and Monied Influence*

PAC's have become increasingly influential in congressional campaigns and legislative lobbying because of the dramatic escalation of campaign expenses.[69] The cost of goods and services used in campaigns has been rising faster than the consumer price index.[70] In 1972 the total cost of House and Senate campaigns nationwide was $98 million;[71] in 1980 it was $242 million.[72] Media time and production costs, which often comprise 30 to 40% of the amounts spent by candidates,[73] are becoming more and more expensive. For example, a thirty-second evening prime time spot on a Portland, Oregon television station cost $55 in 1974; today it costs $3,000. In the same period, the price of thirty prime time seconds on TV in San Diego has jumped from $509 to $3,000.[74] Direct mailing, too, is expensive. The cost of postage continues to escalate, and the direct mail consultants charge hefty fees for their computerized mailing lists and sophisticated techniques.[75]

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ton D.C. has become the best place to raise campaign funds, a concomitant concern is the increasing detachment of candidates from their constituencies." Campaign Finance Study Group, supra, at 1-8.

Not all observers agree that PAC's are overly influential. See Elliott, Political Action Committees—Precincts of the '80's, 22 Ariz. L. Rev. 539, 549-50 (1980) (written by former executive director of AMA PAC) ("Those who would argue that PAC's are dominating or taking over the political process are overstating both the role and the impact of PAC's since only 17.5% of all funds spent by federal candidates in 1978 came from PAC's."); Epstein, supra note 35, at 371-72 ("Whenever PAC contributions, as a percentage of total contributions to candidates, exceed the current level of approximately twenty-five percent, the time will have come for Congress to consider limiting PAC activities.").

[69] See Adamany, supra note 36, at 570 ("The rapid shift from traditional political methods to high-technology campaigning makes money more important precisely because it is readily converted into polling, computerized appeals, professional staff, and media messages.").

[70] See Brief for Appellees Center for Public Financing of Elections, Common Cause, League of Women Voters, et al. at 67-69, Buckley v. Valeo, 424 U.S. 1 (1976) (from 1952 to 1972, consumer price index rose 57.6%; federal campaign spending increased almost 300%); Brief of Senators Hugh Scott and Edward M. Kennedy, Amici Curiae, at 35 n.14, Buckley v. Valeo, 424 U.S. 1 (1976) (separate charts for congressional and presidential campaign expenditures); F. Wertheimer & R. Huwa, supra note 31, at 18.

[71] F. Wertheimer & R. Huwa, Has the Tree Really Fallen? The Role of Television in American Politics 27 (unpublished paper prepared for presentation at annual meeting of Association for Public Policy Analysis and Management, Boston, Mass., Oct. 24, 1980).

[72] Federal Election Commission press release (August 10, 1981).

[73] D. Graber, Mass Media and American Politics 161 (1980). Time Magazine reported an even higher estimate, 60 to 70% of campaign funds. Time, Nov. 20, 1978, at 35. A study of 86 House campaigns in 1978 found that "the single most expensive activity on the average . . . was broadcasting." F. Wertheimer & R. Huwa, supra note 71, at 26-27.

[74] F. Wertheimer & R. Huwa, supra note 71, at 27. From 1974 to 1980, the price of 30 prime time seconds on TV in Baltimore increased from $1,100 to $3,000; from 1978 to 1980, the cost of five minutes of TV time in rural Wisconsin escalated from $250 to $950. One political consultant in Washington, D.C. estimated that spot advertising costs generally increased 40% from 1979 to late 1980. Id.

[75] L. Sabato, The Rise of Political Consultants: New Ways of Winning Elections 228-30, 250-53 (1981) (costs of direct mailing).

The fixation of American politicians upon expensive, media-dominated, highly professional campaigns has made the political process much more vulnerable to the corrosive influence of money. That is the root of my concern. I am not calling for reform on the ground that the new campaign techniques in themselves are prone to confuse or mislead American voters. I do not believe in content regulation or censorship, and all things being equal, I have faith in the common sense of the American electorate.[76] But I am worried by the side effects of the new style of campaigning.

One side effect is that political candidates, caught in a spiraling spending race, turn more readily to PAC's, which can mobilize money and may legally give five times as much as individuals to favored candidates.[77] Another side effect is that able, dedicated individuals, whose ideas and personal qualifications might attract many voters, are deterred from even entering the race for political office because of the immense sums of money required to run a media-based campaign. Unless the potential candidate is personally wealthy or is willing to become beholden to special interests and wealthy donors, he or she may consider the effort hopeless.[78] Such people are the silent casualties of the political process; we do not hear about them because they are defeated before they start. The nation is often the loser.

The growing technological sophistication and rising costs of election campaigns are also closely related to massive inequalities in campaign spending. For a candidate or an issue position with ample supplies of money, the sky is the limit; there are always more ways to spend money if it is available. The result is sometimes grossly unequal spending totals in both candidate and referendum campaigns. Lopsided media spending, in turn, may, in the words of Dean Rosenthal, "overwhelmingly and effectively blo[t] out the messages of [a candidate's] opponents."[79]

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[76] See Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 658 (D.C. Cir. 1971) (Wright, J.), rev'd sub nom. CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973). In the court of appeals decision, I rejected the contention that "spot" editorial advertisements are unworthy of protection because they may be cursory and uninformative. "We must . . . be very, very slow to judge any sort of speech on public issues worthless. The marketplace of ideas protected by the First Amendment, after all, is not governed by the tastes and intellectual standards of the universities or the broadcast newsroom—or even of judicial chambers." 450 F.2d at 658.

[77] See F. Wertheimer & R. Huwa, supra note 71, at 28. PAC's may legally give $5000 to a candidate in a primary or general election campaign; an individual is limited to a $1000 contribution. 2 U.S.C. § 441a(a)(1)(A) (1976).

[78] See L. Berg, H. Hahn & J. Schmidhauser, supra note 3, at 80; D. Graber, supra note 73, at 161-62; Leventhal, supra note 3, at 375; Nicholson, Campaign Financing and Equal Protection, 26 Stan. L. Rev. 815, 816 (1974). The specter of heavy personal campaign debts may also serve as a deterrent to candidacy. One former congressional candidate has vividly described the pressures placed on him during the campaign to incur personal liability in order to provide funds for his campaign, because the candidate is the only "contributor" not limited by statute. Firmage & Christensen, Speech and Campaign Reform: Congress, the Courts and Community, 14 Ga. L. Rev. 195, 210-12 (1980). On the average, the proportion of campaign receipts coming from a candidate's own funds increased from 5.6% in 1974 to 8.9% in 1976 and 9.2% in 1978. The average personal contribution of a House candidate rose from $3,500 in 1974 to $10,200 in 1978. F. Wertheimer & R. Huwa, supra note 31, at 10.

On the other hand, wealthy candidates have figured prominently in recent campaigns. See Firmage & Christensen, supra, at 210; Leventhal, supra note 3, at 382-83. In 1976 nine House candidates spent more than $100,000 of their own funds in their campaigns, and three Senate candidates each spent more than $500,000. F. Wertheimer & R. Huwa, supra note 31, at 10.

The Federal Election Commission's spending data for House and Senate races in 1978 graphically show the extent of inequalities in spending and their correlation with winning and losing.[80] There were 307 contested House races. The winner outspent the loser in 78.8% of those races. Where the spending margin was more than two to one, as it was in 159 races, the bigger spender won 93% of the time. Where one side outspent the other by more than five to one, as occurred in 58 House campaigns, the bigger spender won 100% of the time. The same story is repeated on the Senate side, where the bigger spender won in 31 out of 35 races—88.6%—in 1978.[81] In open-seat Senate races, which eliminated the incumbency advantage, the winner outspent the loser 13 out of 14 times—92.8% of the campaigns. The correlation between success and money is not a statistical artifact. It is a product of the expensive goods and services—television and radio time, media consultants, sophisticated polls, computerized direct mailing operations, political strategists—that money can buy.[82]

D. *Referenda and Initiatives*

The unholy alliance of big spending, special interests, and election victory is found, perhaps in its most dramatic form, in referendum contests. Referenda and initiatives are vehicles of direct popular democracy in twenty-two states and the District of Columbia.[83] Created by the progressive reform movement in the early part of this century, these processes allow the voters to express their views on major public issues directly rather than through elected representatives. They were designed to lessen the influence of special interests and corrupt maneuvering upon major public decisions.[84] Ironically, the advent of media campaigning has made it possible for concentrated wealth to have a powerful impact on referendum campaigns as well. Drastically unequal spending for the tools of persuasion shapes and limits the people's awareness of the issues. And the Supreme Court's decision in *Bellotti* appears to leave the political system powerless to defend itself.[85]

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[79] A. Rosenthal, supra note 59, at 40.

[80] Tabulations are based on Federal Election Commission, FEC Reports on Financial Activity 1977-1978, Interim Report No. 5, U.S. Senate and House Campaigns 121-340 (June 1979) (charts of financial activity in individual Senate and House campaigns arranged by state).

[81] In the bulk of the Senate races, the spending was not even close. In 23 of the 35 races, the winner outspent the loser by 50% or more; in 15 of the 35 races, the margin was 2:1 or more. In dollar terms, the winner outspent the loser by more than $100,000 in 26 races, by more than $200,000 in 23 races, and by more than $500,000 in 11 races.

[82] L. Sabato, supra note 75, at 49-53 (fees, expenses, and commissions charged by political consultants); id. at 79-81 (costs of in-person polls and telephone polls); id. at 179-82 (costs of media advertising); id. at 250-53 (direct mailing expenses and fees).

[83] Statement of Professor Larry L. Berg, *in* Voter Initiative Constitutional Amendment, Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.J. Res. 67, 95th Cong., 1st Sess. 50, 51 (1977) [hereinafter cited as Voter Initiative Constitutional Amendment].

[84] See Shockley, The Initiative, Democracy, and Money: The Case of Colorado, 1976, *in* Voter Initiative Constitutional Amendment, supra note 83, at 172. See generally Voter Initiative Constitutional Amendment, supra note 83.

A number of studies show that, in state after state, in election after election, massive spending and sophisticated media campaigns by special interest groups have swamped referenda that were initially favored by a majority of the voters.[86] One study of referendum and initiative campaigns across the country in 1978 found that the side spending the most won in eleven of fifteen contested campaigns. The side with corporate support outspent its opponents in twelve cases—in eight of these by margins of ten to one or more— and won in two-thirds of these contests. When the corporate side was outspent, it lost every time.[87]

The antismoking initiative on the California ballot in 1978 gives one vivid example of the lopsidedness introduced into the political process by unlimited spending.[88] The initiative proposed to prohibit smoking in enclosed public places, places of employment, and educational and health facilities. At the beginning of September, two months before the election, polls showed 58% of the voters in favor of the measure and only 38% opposed. Then tobacco interests spent $6.4 million in the opposition campaign, almost ten times as much as the proponents of the measure. Philip Morris, Inc. contributed $1.7 million; the R. J. Reynolds Tobacco Company gave $1.7 million. Two other tobacco companies gave $882,000 and $638,000 respectively. The combined expenditures of these four companies alone exceeded the cost of the entire general election campaign for the governorship of California. Buying extensive television spot coverage under the label "Californians for Common Sense," the tobacco industry carried the day. Support for the initiative gradually eroded in the polls, and on election day the vote was 45% for and 55% against.

A similar experience occurred in Colorado in a 1976 referendum ballot on container deposits.[89] Again, the polls showed that in late September the public was strongly in favor of the measure—57% in favor and 27% against. Again, opponents—from the soft drink industry, can manufacturing, iron, steel, and other directly affected interests—poured large amounts of money into the campaign. The opposition war chest totaled $587,000,[90] with more than half a dozen single contributors each outspending the entire campaign in favor of the measure. The industry message dominated television, radio, and newspaper advertising.[91] In prime time, opposition television spots outnumbered favorable spots by 72 to 12, and in non-prime time by 113 to 28. Perhaps it comes as little surprise that there was a significant shift in voter opinion during October and that the initiative was defeated by a vote of nearly two to one, virtually reversing the initial polling results.[92]

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[85] Before 1978, 18 states and a number of municipalities had laws that limited or prohibited corporate contributions or expenditures in ballot question campaigns. S. Lydenberg, Bankrolling Ballots: The Role of Business in Financing State Ballot Question Campaigns 13 (1979). However, taken together, Buckley v. Valeo, 424 U.S. 1 (1976), and First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), protect the right of any person, group, or corporation to make unlimited direct expenditures for or against a ballot proposition. The Supreme Court recently struck down a municipal ordinance limiting contributions by any person to committees favoring or opposing referenda or initiatives. Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434, 443 (1981); see supra note 27.

[86] S. Lydenberg, supra note 85; Mastro, Costlow & Sanchez, Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It, 32 Fed. Com. L.J. 315 (1980); Shockley, supra note 84, at 177–80; Brief in Support of Appellees by Amicus Curiae City and County of San Francisco at 21–25, Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434 (1981) [hereinafter cited as San Francisco Amicus Brief].

[87] S. Lydenberg, supra note 85, at 22–23 (ratios of spending in these 12 cases were 197:1, 96:1, 48:1, 26:1, 25:1, 24:1, 13:1, 10:1, 4.5:1, 4:1, 1.7:1, and unknown). The same author studied 19 ballot issue campaigns in the 1980 election; the side with corporate backing outspent opponents by better than two to one in 15 campaigns and won in 12 of them. See Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434, 443 n.4 (1981) (White, J., dissenting).

[88] S. Lydenberg, supra note 85, at 30–34.

[89] Mastro, Costlow & Sanchez, supra note 86, at 320–27, 330–33, 360–69.

Not only are the two sides in referendum contests often devastatingly unequal in the amounts of money they spend, but their sources of money are also dramatically different. Large corporate and trade association contributions made up the bulk of the funds against the two ballot measures I have described, and the same was true in other initiative campaigns that have threatened special interests. In contrast, proponents have relied very heavily on small contributions.[93] To give just one more example, in 1978 the citizens of Long Beach, California voted on a referendum to reject a proposed lease between the city and Standard Oil for construction of an oil storage terminal. Community opponents of the lease raised $17,721, all of it in contributions under $1,000. Standard Oil and related companies pumped in $864,568; the smallest contribution was over $16,000.[94]

The big-spending media campaigns do not always win,[95] but they win much more often than they lose, distorting the expressed will of the people by the sheer inequality of financial resources and the avalanche of campaign messages. Regardless of their message, they simply drown out their opponents when they have the wherewithal to outspend them by margins of up to fifty to one.[96] In America money controls access to the communications media. In some other presumably civilized countries, those interests monopolizing access to the means of communication have used the big lie, the half truth, and the sly innuendo, amplified and repeated over and over again, to pervert the minds of the people. We, in this country, should be too sophisticated to succumb to such crass approaches, but the election returns that I have discussed seem to indicate that our political hucksters must be pretty sophisticated people too.

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[90] Corporate donations of $500 or more accounted for 91% of the opposition's campaign fund. Id. at 321.

[91] Opponents spent $69,415 on television advertising; under the Fairness Doctrine supporters obtained free time valued at $13,850. On radio, container deposit opponents spent $35,076; proponents had $1,688 worth of free radio time. In the local newspapers, opponents outspent supporters by more than three to one. Id. at 325-26.

[92] The authors found the same phenomena—heavy media spending by the corporate side, an overwhelming imbalance in finances and publicity, and defeat of a grassroots initiative despite strong support in early polls—in two other 1976 Colorado ballot initiatives, one on nuclear safety and one on reform of public utilities regulation. Id. at 320-27, 330-33, 360-69; see Shockley, supra note 84, at 177-89 (case studies of 1976 Colorado initiatives on nuclear safety, bottle deposits, and tax reform, arriving at substantially similar conclusions and discussing shifts in public opinion over the course of each campaign).

[93] S. Lydenberg, supra note 85, at 26-27 (1978 Alaska bottle bill initiative); id. at 33-34 (1978 California antismoking initiative); id. at 37 (1978 Long Beach, California initiative against oil storage terminal); id. at 39-40 (1978 Nebraska bottle deposit initiative); id. at 47-48 (1978 Oregon people's utility district initiative); id. at 54-56 (1978 Montana anti-nuclear initiative); id. at 59 (1978 Oregon utilities rates initiative); Mastro, Costlow & Sanchez, supra note 86, at 321-23 (1976 Colorado initiatives on nuclear safety, container deposits, and public utilities regulation reform); San Francisco Amicus Brief, supra note 86, at 22-24 (1980 California initiatives on smoking limitations, oil profits tax, and repeal of rent control ordinances).

[94] S. Lydenberg, supra note 85, at 37, cited in part in Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434, 443 (1981) (White, J., dissenting).

[95] Studies in California have found that massive spending is more likely to defeat a referendum opposed by special interests than to pass a measure which they favor. See Statement of Professor Larry L. Berg, supra note 83, at 54; Appellee's Brief at 11, Citizens Against Rent

As individuals are squeezed out, as the behemoths of concentrated wealth dwarf the individual and bid fair to dominate the political field, the very purpose of direct democracy is defeated, and voters are bound to become disillusioned and apathetic.[97] This picture might not trouble a convinced pluralist who sees democratic government as nothing more than the result of the pull and tug of aggregated interests in a field of political vectors and partisan forces of greater or lesser intensity.[98] But I believe in the role of equal individuals in the process of American self-government, and I am convinced that this role cannot be snuffed out without at the same time destroying the integrity of our electoral process and the essence of our political faith.

II. THE IDEAL OF POLITICAL EQUALITY

Political equality is the cornerstone of American democracy. Today's electoral processes, tainted by huge inequalities in funds and special access for

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Control v. City of Berkeley, 102 S. Ct. 434 (1981) (quotes systematic study of California statewide ballot measures between 1968 and 1980 which concludes that "one-sided spending is ineffective when it supports the proposition but is dominant when it opposes the measure"); Brief of Amicus Curiae New England Legal Foundation in Support of Appellants, Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434 (1981).

Money is not the only factor determining the results of a referendum campaign. Initial public attitudes, the strength or weakness of the specific measure, events during the campaign, endorsements or opposition by prominent political figures, and other factors play an important part. However, the greater the lopsidedness in spending, the greater the impact that money differentials will have on the outcome of an election.

[96] See supra note 87. One media specialist who worked for two initiative campaigns during the 1976 Colorado elections stated, "I'm afraid money can buy an election. But it's not money alone. It's money cleverly spent." Shockley, supra note 84, at 178.

[97] After three initially popular initiatives were opposed by high-spending media campaigns and defeated at the polls in Colorado in 1976, the Colorado Daily editorialized:

> What was lost on Tuesday was more than . . . good amendments. The big money boys have undoubtedly put a chill on the efforts of citizen groups to put issues on the ballot. Obtaining the needed signatures for an initiative is hard work, and nobody wants to waste his or her time if all is to be stomped under the bankrolls of those with power.

Shockley, supra note 84, at 188; see L. Berg, H. Hahn & J. Schmidhauser, supra note 3, at 49–51 (discussion of voter alienation). Political apathy by the populace runs counter to the purposes and ideals of the democratic system. As Justice Brandeis wrote in Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), "the greatest menace to freedom is an inert people."

[98] See Wright, supra note 17, at 1013–21 (criticizing pluralists' vision of politics).

special interests, fall far short of that ideal and are moving further away every year. But rather than give up faith and drift with the tide, we must reexamine and renew our commitment to realizing America's fundamental political ideals.

The concepts of political equality and self-government stand or fall together. If persons are equal, then none has an inherent right to dominate or impose his will on others. Government can be legitimate only if it is based on the informed consent of all citizens.[99] Rational self-interest dictates, therefore, that each assure his or her own liberty by agreeing to equal liberties for all, including the right to equal political participation.[100] In explaining the essence of the social contract, Rousseau declared that "each giving himself to all, gives himself to nobody; and as there is not one associate over whom we do not acquire the same rights which we concede to him over ourselves, we gain the equivalent of all that we lose, and more power to preserve what we have."[101] These principles of mutual tolerance, respect, and equality are enshrined as well in our own Declaration of Independence.[102]

Throughout American history the ideal of political equality has found eloquent expression, and gradual steps have been taken toward its realization. Nearly two hundred years after the framing of the Constitution, James Madison's words in *Federalist No. 57* challenge us to fulfill their promise:

> Who are to be the electors of the Federal Representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States. . . .
>
> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.[103]

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[99] See 2 J. Locke, Two Treatises of Government ii, 4; viii, 95, reprinted in Readings on Political Philosophy 530, 551 (F.W. Coker ed. 1938) [hereinafter cited as Readings].

[100] J. Rawls, A Theory of Justice 11-19, 205-07, 221-28 (1971); see also Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 214 (1972) (For a government to be legitimate, citizens must be able to recognize its authority "while still regarding themselves as equal, autonomous, rational agents.").

[101] J. Rousseau, The Social Contract, 1, vi, reprinted in Readings, supra note 99, at 639; see id. at 2, iv, reprinted in Readings, supra note 99, at 646-47 ("[t]he social compact establishes among the citizens such an equality that they all pledge themselves under the same conditions and ought all to enjoy the same rights.").

[102] In the words of Alexander Meiklejohn, "[i]f the Declaration of Independence means what it says, if we mean what it says, then no man is called upon to obey a law unless he himself, equally with his fellows, has shared in making it." A. Meiklejohn, Free Speech and Its Relation to Self-Government 10-11 (1948). The people are both the governors and the governed. Under the Constitution, we are agreed that, in Meiklejohn's words, "as free men, politically equal, we alone will make the laws and that, as loyal citizens, equal before the laws, we will obey them." Id. at 105; see id. at 3-11, 22-23.

Meiklejohn subsequently wrote that "the adoption of the principle of self-government by 'The People' of this nation set loose upon us and upon the world at large an idea which is still transforming men's conceptions of what they are and how they may best be governed." Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245, 264.

[103] Federalist No. 57, at 305 (J. Madison) (J. Cooke, ed. 1961).

In the 1830's Alexis de Tocqueville captured the spirit of Jacksonian democracy when he traveled through America. "[T]he principle of the sovereignty of the people hovers over the whole political system of the Anglo-Americans," Tocqueville wrote. "[E]ach individual forms an equal part of that sovereignty and shares equally the government of the state."[104] With great interest, Tocqueville described the civic spirit, energy, and individual self-respect that pervaded American life, which he attributed to the widespread exercise of political rights and responsibilities in a spirit of equality.[105] He also engaged in more theoretical speculations about the philosophical nature of equality, and like Rousseau, postulated a point at which freedom and equality would meet and blend:

> Let us suppose that all the citizens take a part in the government and that each of them has an equal right to do so. Then, no man is different from his fellows, and nobody can wield tyrannical power; men will be perfectly free because they are entirely equal, and they will be perfectly equal because they are entirely free. Democratic peoples are tending toward that ideal. That is the completest possible form for liberty on this earth.[106]

Complete equality and complete freedom were not found in America in Madison's time,[107] or in Tocqueville's. But the Jacksonian period did see major expansions of the suffrage—elimination of property qualifications for voting in state after state.[108] At the federal level, several constitutional amendments have since extended the vote to new categories of citizens.[109]

The Supreme Court, in the twentieth century, has played a major role in eliminating artificial barriers to equal electoral participation: the white primary,[110] the poll tax,[111] and voter qualifications based on property.[112] Most importantly, in the one person, one vote cases the Court emphasized in the strongest and most eloquent manner the centrality of equal voting rights in the American democratic system.[113] In *Reynolds v. Sims*[114] Chief Justice Warren wrote, "[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies."[115]

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[104] A. de Tocqueville, Democracy in America 59 (J.P. Mayer & M. Lerner eds., G. Lawrence trans. 1966); see id. at 474.

[105] Id. at 217-25.

[106] Id. at 473.

[107] Tuttle, Equality and the Vote, 41 N.Y.U. L. Rev. 245, 246 (1966).

[108] See Kirby, The Right to Vote, *in* The Rights of Americans: What They Are—What They Should Be 175, 179-80 (N. Dorsen ed. 1970). Describing the Massachusetts debate in which universal male suffrage was adopted, one historian observed, "The most impressive thing about this entire movement toward broader suffrage is that men came to be filled with a fixed determination that as this country was a democracy all men should have a hand in running it . . . ." Id. at 180 (quoting K. Porter, A History of Suffrage in the United States 70-72 (1969)).

[109] U.S. Const. amend. XIX (admitting women to suffrage); amend. XXIII (enfranchising citizens of District of Columbia in presidential elections); amend. XXIV (abolition of poll tax as precondition for voting); amend. XXVI (admitting 18-to-21-year-olds to vote); see also amend. XVII (direct popular election of senators).

[110] Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

[111] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). The Court declared unequivocally, "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." Id. at 668.

[112] Hill v. Stone, 421 U.S. 289 (1975); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969). But see Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973). The Court has also struck down unreasonably long residency requirements for voting. Dunn v. Blumstein, 405 U.S. 330 (1972).

In the reapportionment cases, the Court moved toward a functional view of equal political participation. Previous cases had established the right to cast a primary or general election ballot and to have the vote counted.[116] In *Wesberry v. Sanders*[117] and *Reynolds v. Sims*[118] the Court added another building block—the vote that is cast and counted must have a proportionately equal opportunity to influence the outcome of the election. Chief Justice Warren recognized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[119]

In *Bullock v. Carter*,[120] the Court took a different step toward a functional view of equality. The Texas system of requiring candidates to pay high filing fees was unconstitutional, the Court held, because it tended to exclude potential candidates who lacked both personal wealth and affluent backers, "no matter how qualified they might be, and no matter how broad or enthusiastic their popular support."[121] Not only did the system deny some voters—especially the less affluent—the opportunity to vote for a candidate of their choosing;[122] it also gave the wealthy the power to place names on the ballot.[123] In other ballot-access cases the Court protected the right of voters to vote effectively by invalidating state requirements that discriminated unjustifiably against minor party and independent candidates.[124]

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[113] Hadley v. Junior College Dist., 397 U.S. 50 (1970) (apportionment for school district trustees election); Avery v. Midland County, 390 U.S. 474 (1968) (county legislature); Reynolds v. Sims, 377 U.S. 533 (1964) (state legislative apportionment); Wesberry v. Sanders, 376 U.S. 1 (1964) (apportionment for congressional seats).

[114] 377 U.S. 533 (1964).

[115] Id. at 565. The Chief Justice also declared, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." Id. at 560 (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

[116] United States v. Saylor, 322 U.S. 385 (1944) (right to vote protected against ballot-box stuffing); United States v. Classic, 313 U.S. 299 (1941) (right to have vote counted as cast in primary election); Guinn v. United States, 238 U.S. 347 (1915) (right to cast general election ballot); United States v. Mosley, 238 U.S. 383, 386 (1915) (right to have vote counted in general election); Ex parte Yarbrough, 110 U.S. 651 (1884) (same]; see Bixby, The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at *United States v. Classic*, 90 Yale L.J. 741, 786-812 (1981).

[117] 376 U.S. 1, 14-17 (1964).

[118] 377 U.S. 533 (1964); see Auerbach, The Reapportionment Cases: One Person, One Vote—One Vote, One Value, 1964 Sup. Ct. Rev. 1.

[119] 377 U.S. at 555 (footnote omitted). Nearly three centuries earlier, John Locke had recognized that malapportionment and rotten boroughs were inconsistent with his theory of the social contract. See J. Locke, supra note 99, xiii, 158, reprinted in Readings, at 572-73.

[120] 405 U.S. 134 (1972).

[121] Id. at 143.

[122] "[T]he rights of voters and the rights of candidates," the Court wrote, "do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." Id.

When barriers to equality are imposed not by state action, but by circumstances or economic resources or private persons, the equal protection clause might no longer provide protection.[125] Nevertheless, the bounds imposed by the state action requirement do not limit the fundamental ideal of political equality that underpins our democratic system of government. That ideal must inspire all of us as citizens. In the words of Dean Rosenthal,

> The goal of enriching the electoral system, through broadening the base of citizen influence and reducing inequities in the opportunities of candidates and their supporters to persuade the electorate, is a worthy one; it is not only consistent with but indispensable to the attainment of the most fundamental purposes of the Constitution.[126]

Political inequalities stemming from disparities in wealth have historically made Americans uneasy. As my late colleague Harold Leventhal observed, many Americans have long perceived a need for a "larger purpose of democratic government, the need of a self-governing people to trammel the exploding capabilities of what were called the vested interests."[127] He referred to, among others, Theodore Roosevelt, who in 1910 theorized that "if our political institutions were perfect, they would absolutely prevent the political domination of money in any part of our affairs." Recognizing, however, the reality of American politics in his time, Roosevelt called for a corrupt practices act "to prevent the advantage of the man willing recklessly and unscrupulously to spend money over his more honest competitor."[128]

Political philosopher John Rawls has recognized that the dominance of wealth in the political process is inconsistent with both the philosophical meaning and the practical exercise of political equality. Rawls maintained that the "worth of liberty" was not the same for everyone, because of "the inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally."[129] He added:

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[123] Id. at 143-44. Subsequently, in Lubin v. Panish, 415 U.S. 709 (1974), the Court struck down another filing-fee requirement, stressing that "voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance." Id. at 716. Chief Justice Burger wrote, "[O]ur tradition has been one of hospitality toward all candidates without regard to their economic status." Id. at 717-18. The Court has also invalidated a requirement that candidates be property owners. Turner v. Fouche, 396 U.S. 346, 363-64 (1970).

[124] Storer v. Brown, 415 U.S. 724, 738-40 (1974); Williams v. Rhodes, 393 U.S. 23 (1968). But see American Party of Texas v. White, 415 U.S. 767 (1974); Jenness v. Fortson, 403 U.S. 431 (1971).

[125] See Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976). But see Pekelis, Private Governments and the Federal Constitution, *in* Law and Social Action 91, 113-14 (1970) (proposing new view of state action based on sociological test of "actual influence"; illegitimate economic pressures may be unconstitutional if they "do control in fact the political processes of a given society"); Nicholson, supra note 78, at 830 (suggesting "state action" as basis for requiring campaign finance restrictions under equal protection clause).

[126] Rosenthal, Campaign Financing and the Constitution, 9 Harv. J. Legis. 359, 360 (1972).

[127] Leventhal, supra note 3, at 370.

[128] Quoted in id. at 363.

> The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation.[130]

More recently Chief Justice Burger seized upon this theme to justify allowing the television networks to close their airwaves to paid political announcements.[131] Although I do not agree with the conclusion in that case,[132] the Court's discussion of the potential impact of wealth upon politics is worth noting. The public interest in providing access to the marketplace of ideas and experiences, the Chief Justice wrote, "would scarcely be served" by compelling broadcasters to accept paid political ads, because this system would be "so heavily weighted in favor of the financially affluent, or those with access to wealth." Even under a first-come, first-served system, the Chief Justice continued, "the views of the affluent could well prevail over those of the others, since they would have it within their power to purchase time more frequently,"[133] and they might monopolize the available time. Requiring broadcasters, under the Fairness Doctrine, to provide free time for opposing views would not redress the imbalance, because "the affluent could still determine in large part the issues to be discussed."[134] The right of access, the Chief Justice concluded, "would have little meaning to those who could not afford to purchase time in the first instance."[135] The unstated but inescapable premise of this discussion is that the political arena is less healthy, and less likely to serve the public interest and democratic ideals, if the agenda and the discussion are dominated by those with ample financial resources. Apparently the Chief Justice and the Court did not have these concerns in mind when *Buckley* and *Bellotti* were under consideration.

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[129] J. Rawls, supra note 100, at 204. This distinction between rights and the power to secure these rights is also made by philosopher Bernard Williams. He writes:

> It may be said that in a certain society, men have equal rights to a fair trial, to seek redress from the law for wrongs committed against them, etc. But if a fair trial or redress from the law can be secured in that society only by moneyed and educated persons, to insist that everyone *has* this right, though only these particular persons can *secure* it, rings hollow to the point of cynicism: we are concerned not with the abstract existence of rights, but with the extent to which those rights govern what actually happens.

Williams, The Idea of Equality, *in* Philosophy, Politics and Society, ser. II, at 110-31 (1962), reprinted in Justice and Equality 116, 128-29 (H. Bedau ed. 1971) (emphasis in original).

[130] J. Rawls, supra note 100, at 225. Rawls therefore suggests public funding of campaigns, "for when parties and elections are financed not by public funds but by private contributions, the political forum is so constrained by the wishes of the dominant interests that the basic measures needed to establish just constitutional rule are seldom properly presented." Id. at 226.

These insights should carry over into constitutional analysis. As Dean Rosenthal has written, "[I]f the Constitution requires that each man's vote count equally, may not that fact be deemed pertinent in consideration of the validity of measures intended to reduce inequalities in men's opportunities to affect the vote?" Rosenthal, supra note 126, at 377.

[131] CBS v. Democratic Nat'l Comm., 412 U.S. 94, 123 (1973).

[132] See Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), rev'd sub nom. CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[133] 412 U.S. at 123.

[134] Id.

[135] Id.

The broader purposes of our political system are ill-served by allowing the power of money to drown out the voices of the relatively moneyless, or by allowing too many contests to turn on the differences in the amounts of money that candidates have to spend. We cannot rest content with our past achievements, proud as they are, in advancing toward legal equality in the political process. The trenchant social critic Anatole France wrote, in the late nineteenth century, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[136] A latter-day Anatole France might well write, after observing American election campaigns, "The law, in its majestic equality, allows the poor as well as the rich to form political action committees, to purchase the most sophisticated polling, media, and direct mail techniques, and to drown out each other's voices by overwhelming expenditures in political campaigns." And the law, in its majestic equality, has imported the decision criteria of the commercial marketplace into the sanctum of political decisionmaking.[137] When money becomes more important than people, when media mastery weighs more heavily than appeals to judgment, when opportunities to communicate with voters are extremely unequal, the result is a cynical distortion of the electoral process. The people's choices are not based on their informed preferences among ideas and candidates, and government of the people, by the people, and for the people becomes an empty shibboleth.

III. IS THE FIRST AMENDMENT THE OBSTACLE TO POLITICAL EQUALITY THE SUPREME COURT SAYS IT IS?

As I have indicated, Congress, in the aftermath of Watergate, tried to turn the tide of moneyed influence and to enhance political equality by statutory restrictions on campaign spending. In significant part, these efforts were repudiated by the Supreme Court in *Buckley* and *Bellotti*, under the guise of first amendment protection for political speech.[138] Paradoxically, by equating political spending with political speech and according both the same constitutional protection, the Court placed the first amendment squarely in opposition to the democratic ideal of political equality. This perverse result derives from a narrow view of freedom of expression, divorced from the broader ideals of our political system.

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[136] A. France, The Red Lily 91 (W. Stephens trans. 1894). This passage was quoted by Justice Frankfurter in Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring), and by Justice Brennan in Maher v. Roe, 432 U.S. 464, 483 (1977) (Brennan, J., dissenting).

[137] See L. Berg, H. Hahn & J. Schmidhauser, supra note 3, at 41-46 (explaining differences between principles underlying economic market and one-person, one-vote in the political arena). Financial participation in politics is far more expandable than other political activities and hence creates much greater potential for unequal influence. Adamany, supra note 36, at 570-71; see also Note, The Corporation and the Constitution: Economic Due Process and Corporate Speech, 90 Yale L.J. 1833, 1855 (1981) (criticizing *Bellotti* decision because it "allows access to political audiences to be allocated in ways that more closely reflect the dominance of corporate wealth in the economy").

[138] The Court asserted that "the concept that government may restrict the speech [i.e., spending] of some elements of our society in order to enhance the relative voices of others is

In *Buckley* and *Bellotti* the Court donned the mantle of the first amendment heritage. The Court's opinions in those two cases cited earlier decisions touching on virtually all of the major areas of sustained first amendment controversy in this century—political libel, seditious speech, freedom of the press, comtempt of court, labor picketing, obscenity, commercial speech, civil rights activity, and the right to petition.[139] From Justice Holmes's dissent in *Abrams v. United States* and Justice Brandeis's concurrence in *Whitney v. California* to the opinions for the Court in *Thornhill v. Alabama*, *NAACP v. Alabama*, and *New York Times Co. v. Sullivan*, the authorities relied on in the two recent election law cases are virtually an honor roll of great first amendment cases.

Bellotti also cited an article by one of the leading theoreticians of the first amendment, Alexander Meiklejohn's "The First Amendment is an Absolute."[140] Facile absolutism indeed marks the tone of the Court's discussion of expenditure limits in both *Buckley* and *Bellotti*.[141] In an earlier discussion I

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wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 48-49 (1976); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790-91 (1978); Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434, 437 (1981).

[139] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (commercial speech) (cited in *Bellotti*, 435 U.S. at 783, 784 n.20); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 250 (1974) (freedom of the press) (cited in *Buckley*, 424 U.S. at 50-51, and in *Bellotti*, 435 U.S. at 791 n.30); Mills v. Alabama, 384 U.S. 214, 218, 220 (1966) (freedom of the press) (cited in *Buckley*, 424 U.S. at 45, 50, and in *Bellotti*, 435 U.S. at 776-77, 781); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (political libel) (cited in *Buckley*, 424 U.S. at 48, 49, and in *Bellotti*, 435 U.S. at 783, 785 n.21, 786 n.23); NAACP v. Button, 371 U.S. 415 (1963) (civil rights activity) (cited in *Buckley*, 424 U.S. at 22-23, 41, 48); Wood v. Georgia, 370 U.S. 375, 388 (1962) (contempt of court) (cited in *Bellotti*, 435 U.S. at 790, 792); Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (right to petition) (cited in *Buckley*, 424 U.S. at 49); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) (obscenity; prior restraint) (cited in *Bellotti*, 435 U.S. at 790); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (civil rights activity) (cited in *Buckley*, 424 U.S. at 22, and in *Bellotti*, 435 U.S. at 780, 786); Roth v. United States, 354 U.S. 476 (1957) (obscenity) (cited in *Buckley*, 424 U.S. at 49); Associated Press v. United States, 326 U.S. 1, 20 (1945) (freedom of the press) (cited in *Buckley*, 424 U.S. at 49, and in *Bellotti*, 435 U.S. 777 n.12); Bridges v. California, 314 U.S. 252, 270 (1941) (contempt of court) (cited in *Buckley*, 424 U.S. at 48); Thornhill v. Alabama, 310 U.S. 88 (1940) (labor picketing) (cited in *Bellotti*, 435 U.S. at 776, 791 n.31); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (seditious speech) (cited in *Buckley*, 424 U.S. at 53, and in *Bellotti*, 435 U.S. at 791-92 n.31); Abrams v. United States, 250 U.S. 616, 634 (1919) (Holmes, J., dissenting) (seditious speech) (cited in *Bellotti*, 435 U.S. at 791-92 n.31).

[140] Meiklejohn, supra note 102, cited in *Bellotti*, 435 U.S. at 791 n.31. The Court referred to Meiklejohn in support of the proposition that "[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." Id. The *Bellotti* opinion also cited Meiklejohn's book, Free Speech And Its Relation to Self-Government (1948), and a book by Thomas Emerson, Toward a General Theory of the First Amendment (1966). 435 U.S. at 777 n.11.

[141] See Leventhal, supra note 3, at 358-59, 373; Nicholson, Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974, 1977 Wisc. L. Rev. 323,

examined the fallacies in the reasoning in *Buckley* that led the Court to conclude that Congress may not constitutionally attempt to equalize speech opportunities by placing a ceiling on expenditures by candidates and committees.[142] Here I will attempt a broader task—showing that the Court in *Buckley* and *Bellotti* misappropriated the talismans of our first amendment past. By ritual incantation of the notion of absolute protection, by applying it to the quantity as well as the content of political expression, and by making the unexamined and unprecedented assertion that money is speech, the Court elevated dry formalism over substantive constitutional reasoning. Political discussion is indeed at the core of the first amendment's guarantees,[143] but the very centrality of political speech calls for a thorough rather than a conclusory analysis.

In order to understand the missteps taken by the Supreme Court, we must return to the first amendment heritage—the principles developed during this century to protect first amendment liberties.[144] The landmark cases invoked by the Court in *Buckley* and *Bellotti* quite properly carried the message that particular opinions and beliefs may not be suppressed by the government even if their content is unpopular with the majority,[145] threatening to dominant economic or social groups,[146] or critical of the structure or personnel of government.[147] It is not enough, however, to look at selected references from these cases. To appreciate their contribution to the development of first

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372; Comment, Cases That Shock the Conscience: Reflections on Criticism of the Burger Court, 15 Harv. C.R.-C.L. L. Rev. 713, 736-37 (1980) (criticizing *Buckley* and *Bellotti* for "detach[ing] the auxiliary rules from their original purpose on the basis of the right's all-encompassing, indiscriminate character").

[142] Wright, supra note 17; see Leventhal, supra note 3, at 358-67, 369 (discussing weaknesses in Court's analysis in *Buckley* opinion). Judge Leventhal observed pointedly, "[W]hat is missing from the Supreme Court's opinion is any sense of the history of campaign reform legislation, of the grievous abuses that prompted it, the frustration that accompanied it, the evasion and political pressures that have undermined all less-than-comprehensive measures of reform." Id. at 362.

[143] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) ("the heart of the First Amendment's protection"); Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("area of the most fundamental First Amendment activities"); Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office").

[144] The Court has never developed a comprehensive theory of the meaning of the first amendment; it has used a hodge-podge of different doctrines at various times and in various contexts. See N. Dorsen, P. Bender & B. Neuborne, 1 Emerson, Haber, & Dorsen's Political and Civil Rights in the United States 57-59 (4th ed. 1976); T. Emerson, The System of Freedom of Expression 15-16 (1970); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 20 (1971); Van Alstyne, A Graphic Review of the Free Speech Clause, 70 Calif. L. Rev. 107 (1982). But some principles have stood the test of time.

[145] See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Alabama libel judgment against newspaper for publication of civil rights group advertisement).

[146] See, e.g., Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) (censorship based on film's presentation of adultery in a favorable light); Thornhill v. Alabama, 310 U.S. 88 (1940) (ban on labor picketing)

[147] See, e.g., Wood v. Georgia, 370 U.S. 375 (1962) (contempt conviction of sheriff who had criticized county judge); Grosjean v. American Press Co., 297 U.S. 233 (1936) (discriminatory tax imposed by Huey Long regime on selected group of newspapers).

amendment principles, we must examine their historical context and the intellectual influences that they reflect.

Abrams and *Whitney*,[148] landmark opinions by Justices Holmes and Brandeis in the decade after the First World War, grew out of the postwar obsession with subversives and seditious groups. *Abrams* was an appeal from the conviction of a small handful of radicals who had published two pamphlets seeking to arouse workers to international unity and had flung some copies out of a Manhattan window. *Whitney* sought to overturn the conviction of an official of the California branch of the Communist Labor Party under the state's criminal syndicalism statute. Holmes and Brandeis disapproved of both convictions but failed to convince the majority of the Court.[149] Both Justices were significantly influenced by the seminal theoretical writings of Zechariah Chafee, Jr.,[150] who had begun to write about the first amendment because he was deeply troubled by the wholesale trials and convictions of radicals and pacifists under the World War I Espionage Act.[151]

A similar concern with suppression of unpopular messages is found in the context and intellectual roots of *New York Times Co. v. Sullivan*.[152] The newspaper had been subjected to a libel judgment of $500,000 by an Alabama jury for publishing a political advertisement by a civil rights group that contained partially inaccurate statements about the actions of Alabama officials.[153] In fashioning a constitutional libel standard protecting negligently inaccurate criticism of public officials, the Court emphasized our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."[154] Underlying this commitment was the conception that the very idea of self-government bestows upon the public the privilege, the right, and the duty of criticizing government and government officials.[155] The "central meaning of the First Amendment," the Court declared, "is to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[156] As Justice Brennan, the author of *New York Times Co. v. Sullivan*, has observed,[157] these ideas reflect the views of Alexander Meiklejohn, who, like Chafee, first forayed into the first amendment arena at a time of governmental suppression of ideas. Meiklejohn's *Free Speech and Its Relation to Self-Government*[158] was published in the shadow of the McCarthy era. The book decried legislative investigations and administrative programs that sought to protect the minds of citizens "from the influence of assertions, of doubts, of questions, of plans, of principles which the government judges to be too 'dangerous' for us to hear."[159]

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[148] Abrams v. United States, 250 U.S. 616 (1919); see id. at 624 (Holmes, J., dissenting). Whitney v. California, 274 U.S. 357 (1927); see id. at 372 (Brandeis, J., concurring).

[149] Holmes dissented in *Abrams* and was joined by Brandeis. 250 U.S. at 624. In *Whitney* Brandeis, joined by Holmes, concurred in the Court's opinion upholding the syndicalism conviction, but his approach differed fundamentally from that of the majority. The majority, citing Gitlow v. New York, 268 U.S. 652, 666-68 (1925), held that the state legislature's decision to make criminal any association with a group that advocated violence or terrorism as a means of accomplishing political change was a legitimate exercise of police power to prohibit "utterances inimical to the public welfare, tending to incite to crime, disturb the public peace or endanger the foundations of organized government and threaten its overthrow by unlawful means." 274 U.S. at 371. Brandeis took issue with this approach. Finding the statute to aim "not at . . . criminal syndicalism . . . but at association with those who propose to preach it," id. at 373, Brandeis argued that a legislature could not curtail such speech unless it presented a clear and present danger of an immediate and a serious harm. Id. at 374-77. The mere legislative act of proscribing the speech was insufficient to support a finding of clear and present danger, he contended. Despite arguing for the significantly higher threshold, Brandeis concurred in the Court's judgment because the defendant had failed to raise the absence of clear and present danger as a defense at trial, and Brandeis felt constrained from inquiring into the issue on review of a state court judgment. Id. at 379-80. Nonetheless, the concurrence registered a fundamental disapproval of the majority approach. See Bork, supra note 144, at 23.

[150] Rabban, The First Amendment in Its Forgotten Years, 90 Yale L.J. 514, 591-94 (1981).

[151] Id. at 586-91; Chafee, Thirty-Five Years with Freedom of Speech, 1 U. Kan. L. Rev. 1, 1-2 (1952). Chafee's basic theoretical insights were set forth in a Harvard Law Review article published in June 1919. Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932 (1919). Chafee repeated his message in several of his subsequent works. See, e.g., Z. Chafee, Freedom of Speech (1920); Z. Chafee, Free Speech in the United States 1-35 (1941).

[152] 376 U.S. 254 (1964).

[153] The Court found, however, that the evidence did not support a finding that the allegedly libelous statements were made "of and concerning" the particular public official who was plaintiff in the case. Id. at 288-92.

The terrain of first amendment work on political expression up to the 1970's is thus a landscape dominated by content-regulation questions.[160] The theory of the first amendment expressed in *Abrams* and *Whitney* differs in some important ways from the theory underlying the *Sullivan* case,[161] and Chafee's views are by no means the same as Meiklejohn's,[162] but these very divergences emphasize the context they have in common. That context is the need to defend political expression, no matter how unorthodox its ideas, from the majority's tendency to suppress dissident voices, and from efforts by those in power to muzzle their political opponents.

I favor a reading of the first amendment that is powerful and expansive, one that accords with the view of Justice Hugo Black that the first amendment rightfully takes first place in the Bill of Rights.[163] Like constitutional law generally, first amendment thinking must necessarily adapt to the changing needs and evolving perceptions of society.[164] But while theoretical formulation and emphasis may change, the core notion of the first amendment remains the protection of diverse, antagonistic, and unpopular speech from restriction based on substance. To invoke the first amendment, not to protect diversity, but to prevent society from defending itself against the stifling influence of money in politics is to betray the historical development and philosophical underpinnings of the first amendment.

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[154] Id. at 270.

[155] Id. at 269-75, 282; see Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 209.

[156] 376 U.S. at 273, 266, 269 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945), and Roth v. United States, 354 U.S. 476, 484 (1957)). These words were the centerpiece of the Court's decision to protect unlimited political spending in *Buckley v. Valeo*—but they originated in judicial protection of a newspaper that had served as a vehicle for criticism of public officials on the inflammatory issue of civil rights. See Kalven, supra note 155, at 192 (noting that the case is a major instance of the important constitutional consequences of the civil rights movement).

[157] Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1, 10, 14-15, 18 (1965); see Kalven, supra note 155, at 209, 221.

[158] A. Meiklejohn, supra note 102.

[159] Id. at xiii; see id. at x-xi, 46, 93.

[160] In Police Department v. Mosley, 408 U.S. 92, 95-96 (1972), the Court stressed, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . . The essence of this forbidden censorship is content control."

[161] See Brennan, supra note 157, at 9-10.

[162] See A. Meiklejohn, supra note 102, at 61-70 (criticizing Chafee's first amendment theories).

None of the rationales for strong protection of free expression—truth, autonomy and self-fulfillment, social stability, or self-government—justifies the continuing and unchecked abuses that excessive spending has brought to the electoral process. Chafee's thought, elaborated in a series of articles and books, was based on a single core idea—that freedom of expression is essential to the search for truth.[165] Holmes stated the same view with unmatched eloquence in *Abrams*:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[166]

But the truth-producing capacity of the marketplace of ideas is not enhanced if some are allowed to monopolize the marketplace by wielding excessive financial resources. Just as proponents of the free market system generally recognize the need for government policing of the competitive economic process by enforcement of antitrust laws,[167] proponents of freedom of expression must recognize the need for government policing of the competitive electoral process by campaign finance laws.[168]

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[163] See E. Cahn, The Firstness of the First Amendment, *in* Confronting Injustice 86 (1962).

[164] See Wright, Professor Bickel, The Scholarly Tradition, and the Supreme Court, 84 Harv. L. Rev. 769, 786 (1971) ("[P]articular fact situations influence the course of the law. If an unanticipated fact situation forces a modification of previously articulated goals and rules, then so be it. But the general thrust of constitutional adjudication should remain firmly grounded in the ideals of the constitutional text."). Cf. Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 228-29 (1980) (constitutional decisionmaking must respond to changes in social needs and values); Reich, Mr. Justice Black and the Living Constitution, 76 Harv. L. Rev. 673, 736 (1963) ("A constitutional provision can maintain its integrity only by moving in the same direction and at the same rate as the rest of society. In constitutions, constancy requires change.").

[165] Z. Chafee, Free Speech in the United States, supra note 151, at 31, 137-38; Chafee, Freedom of Speech in War Time, supra note 151, at 956.

[166] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[167] See, e.g., R. Posner, Antitrust Law: An Economic Perspective 8-18 (1976) (economic inefficiency of monopoly supports effective antitrust policy).

[168] See Leventhal, supra note 3, at 373-74. Similarly, structural obstacles to free competition in the marketplace of ideas create the need for government-mandated rights of access to the

The first amendment absolutism of Justice Hugo Black[169] and Thomas Emerson[170] is consistent with financial reform of the electoral process. Emerson stressed the dynamics of freedom of expression, pointing out that intense pressures for conformity exist at all times and in all places and require the utmost vigilance to protect free speech against abridgment.[171] Both Black and Emerson also emphasized the need for self-expression as an element of personal autonomy and self-fulfillment, and warned that suppression of a person's beliefs subjects his mind to the dehumanizing control of others.[172] Campaign finance reforms promote the same values that these thinkers found in the first amendment. Unchecked political expenditures, no less than crass regulation of ideas, may drown opposing beliefs, vitiate the principle of political equality, and place some citizens under the damaging and arbitrary control of others.[173] Limiting the amount that wealthy interests may spend to publicize their views enhances the self-expression of individual citizens who lack wealth, furthering the values of freedom of speech.

The safety-valve function of the first amendment, expounded by Justice Brandeis in *Whitney v. California*,[174] also harmonizes with the goals of cam-

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broadcast media. As Jerome Barron has contended, the assumption that there is a self-sustaining free market mechanism for ideas stems from "an essentially romantic view of the first amendment." Changes in the communications industry, Barron recognizes, have destroyed the equilibrium in the marketplace of ideas, making laissez-faire irrelevant and requiring active government intervention to assure access to the media by speakers with varying viewpoints. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1647-48, 1653-56 (1967).

[169] Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865, 881 (1960) ("Our First Amendment was a bold effort . . . to establish a country with no legal restrictions of any kind upon the subjects people could investigate, discuss, and deny."); cf. id. at 880 (other provisions of Bill of Rights buttress first amendment by protecting "the weak and the oppressed from punishment by the strong and the powerful who wanted to stifle the voices of discontent raised in protest against oppression and injustice in public affairs"). Black also relied on a slippery-slope analysis that resembled Emerson's. See Cahn, Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U. L. Rev. 549, 559 (1962); Reich, supra note 164, at 719-20.

[170] T. Emerson, supra note 144, at 10.

[171] Emerson wrote, "[I]t is necessary to recognize the powerful forces that impel men towards the elimination of unorthodox expression. Most men have a strong inclination, for rational or irrational reasons, to suppress opposition." T. Emerson, supra note 144, at 9, see id. at 9-11; Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 887-93 (1963).

[172] See T. Emerson, supra note 144, at 6, 21; Cahn, supra note 169, at 554 (Black's view that, to "preserve a dictatorship, you must be able to stifle thought, imprison the human mind and intellect"); cf. Black, supra note 169, at 880 ("Our own free system to live and progress has to have intelligent citizens, citizens who can not only think and speak and write to influence people, but citizens who are free to do that without fear of governmental censorship or reprisal."). Both men agreed, however, that actions were properly subject to government control. See T. Emerson, supra note 144, at 17; Cahn, supra note 169, at 558.

[173] See supra text accompanying notes 99-137.

[174] 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see Rabban, supra note 150, at 592-93 (discussing influences on Brandeis's thought); id. at 578-79 (views of prewar scholars Ernst Freund, Thomas Cooley, and Theodore Schroeder that libertarian standards for speech reduced danger of violence and crime); cf. T. Emerson, supra note 144, at 7 (freedom of expression is a method of achieving a more adaptable and hence more stable community). But see Bork, supra note 144, at 25 (safety-valve function involves solely issues of expediency or prudence, not of constitutional magnitude).

paign finance reform. Brandeis was concerned with the views of the downtrodden and discontented. The Founders knew, he wrote,

> that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[175]

But the argument of stability and order does not support unlimited political expenditures by the wealthy, nor does it immunize the lengthening shadow of PAC's in congressional elections.[176] Indeed, if Brandeis, who fought vigorously against big oppressive organizations and against concentrated wealth,[177] had witnessed the contemporary electoral scene, he might have written that it is hazardous to discourage civic spirit, hope, and participation; that disillusionment breeds alienation; that alienation breeds apathy; that apathy menaces the democratic idea; and finally that the path of safety lies in allowing individuals an opportunity to persuade the public by participating freely and equally in the electoral process.

Although all of the leading first amendment rationales may be comfortably reconciled with campaign spending reforms, the theory of Alexander Meiklejohn more than any other permits—perhaps even demands—restrictions on inequalities of financial resources.[178] Meiklejohn saw self-government as the fundamental principle of the first amendment.[179] Freedom of expression, he wrote, was the indispensable prerequisite for informed, rational decisionmaking; it was therefore essential to a self-governing populace of political equals bound by voluntary compact. In earlier controversies self-government was best served by removing government restrictions on political expression. In today's political forum that ideal is also served by permitting government regulation of the influence of money in politics, so that the wealthiest voices may not dominate the debate by the strength of their dollars rather than their ideas.

Meiklejohn made a perceptive distinction between abridging speech—which is sometimes permissible—and abridging the freedom of speech—which

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175. 274 U.S. at 375.

176. Cf. Barron, supra note 168, at 1649 ("If freedom of expression cannot be secured because entry into the communication media is not free but is confined as a matter of discretion by a few private hands, the sense of the justice of existing institutions, which freedom of expression is designed to assure, vanishes from some section of our population . . . .").

177. Mason, Louis D. Brandeis, *in* 3 The Justices of the United States Supreme Court 1789-1969, at 2043, 2044-45 (L. Friedman & F. Israel eds. 1969).

178. Several commentators have recognized that a clash of first amendment values is involved in campaign finance cases. See, e.g., Emerson, supra note 171, at 948 ("not the reconciliation of freedom of expression with another kind of interest but the reconciliation of opposing interests within the system of free expression itself"); Freund, supra note 59, at 72; Leventhal, supra note 3, at 372.

179. A. Meiklejohn, supra note 102; cf. Bork, supra note 144, at 23, 26 (political speech is only type of expression protected by the first amendment). I do not agree with Bork's narrow view of the scope of the constitutional protection of freedom of expression, but I agree with him and with Meiklejohn that self-government and free speech are inextricably interrelated.

is almost always forbidden.[180] His analogy was the town meeting, the paradigm of the direct democratic ideal.[181] There, he noted, regulating and abridging communication is necessary for orderly presentation and intelligent deliberation. "It is not a dialectical free-for-all," he reminded his readers. "It is self-government."[182] In Meiklejohn's view, the first amendment protects not the individual's desire for self-fulfillment but the collective thought processes of the community.[183]

It is to prevent mutilation of these communal thought processes that campaign finance reforms are so essential. An election campaign is finite in time and focuses on specific ballot decisions regarding specific alternatives.[184] Expenditure limits and other curbs on campaign finance practices are analogous to rules of order at a town meeting, enforced so that the deliberative process is not distorted. The first amendment does not permit curbs on general discussion of political, economic, or social controversies. But, like the loud mouth and long talker at the town meeting, untrammeled spending during an election campaign does not serve the values of self-government, nor can it lay claim to first amendment protection.

In two categories of cases the Supreme Court has recognized that speech may be abridged without abridging the freedom of speech guaranteed by the first amendment—those that involve time, place, and manner restrictions, and those that involve allocation schemes. Time, place, and manner restrictions limit the untrammeled freedom of would-be speakers in the interests of would-be non-listeners. These restrictions serve interests in peace and quiet unrelated to suppressing communication. Thus, a nondiscriminatory ordinance may prohibit unreasonably loud, raucous operations by sound trucks on the streets of a community. As the Court recognized in *Kovacs v. Cooper*,[185] the Constitution does not require a community to suffer the nuisance of unregulated broadcasts that impose uninvited messages upon a captive audience.[186]

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[180] A. Meiklejohn, supra note 102, at 19. As Meiklejohn noted, "The First Amendment . . . is not the guardian of unregulated talkativeness." Id. at 25; see J. Rawls, supra note 100, at 203; Meiklejohn, supra note 102, at 252, 261.

[181] A. Meiklejohn, supra note 102, at 22–27. But see Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 39–40 (1975) (criticizing town meeting analogy).

[182] A. Meiklejohn, supra note 102, at 23.

[183] Id. at 24–26, 65.

[184] See T. Emerson, supra note 144, at 639–40 (contrasting limits on election campaigns, which may be permissible because they "are directed to a limited end and deal with a limited situation," and limitations on expression in other contexts, which are forbidden); Chevigny, supra note 55, at 219 ("election campaign is not an unlimited field of debate"; "the fact that a reply is theoretically possible after the election or outside the campaign is of little importance"). In contrast, in the area of general political discussion unrelated to campaigns, Brandeis's prescription holds good: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[185] 336 U.S. 77 (1949).

[186] Id.; cf. Freund, supra note 59, at 72 ("We are dealing here not so much with the right of personal expression or even association, but with dollars and decibels. And just as the volume of sound may be limited by law, so the volume of dollars may be limited, without violating the First Amendment.").

In contrast to time, place, and manner restrictions, allocation schemes limit the freedom of would-be speakers in the interest of would-be listeners. These schemes protect the integrity of the system of communications itself. When the forum is limited by physical, technological, or economic factors, the messages of some speakers must be limited if all points of view are to be heard, so that the audience may enjoy a full range of uninhibited debate. Allocation of limited opportunities for speech prevents mutual interference or distortion, and thus enhances the flow of information to listeners. Thus, in the broadcasting industry, in which the number of usable frequencies is technologically limited, the Court has been compelled to recognize the existence of clashing first amendment interests: the claimed exclusive rights of the broadcasting licensees and the rights of others who seek access to the media to express their views. To cushion the clash between the two groups the Court has focused instead on the listeners and has recognized that their first amendment rights are better served by diversity than by monopoly. As Justice White wrote for the Court in *Red Lion Broadcasting Co. v. FCC*,[187] it is "the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[188]

Regulating campaign finance to prevent the polluting effects of financial inequalities involves a hybrid of both categories of permissible limitations on speech—time, place, and manner regulation and allocation schemes. Like time, place, and manner regulations, it serves social interests unrelated to suppressing communication, such as the fundamental interest in preserving political equality, and the more specific goals of removing financial barriers to candidacy, encouraging citizen involvement in the political process, and avoiding the danger that the wealthy can hold elected officials in political captivity.[189] Also, like the allocation of broadcasting licenses and the Fairness Doctrine, campaign finance restrictions protect the system of communications itself in the interest of speakers and voter-listeners. Excessive and unequal spending by one side interferes with the other's communication and, if the inequality is great enough, can effectively and completely drown out the other's message to the voters.[190] Even though the forum for electoral communications is not limited in the same technical sense that the broadcasting spectrum is, it is limited in time and subject matter, so that the first amendment interests of candidates and voters require safeguards against the potential for distortion and monopoly created by unlimited spending.

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[187] 395 U.S. 367 (1969).

[188] Id. at 390. Justice White added:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

Id. The opinion essentially adopts Meiklejohn's view of the first amendment.

The Court has reaffirmed the general principle stated in *Red Lion* in subsequent cases. See CBS v. FCC, 453 U.S. 367, 395 (1981); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 101-02 (1973).

[189] See Brief for Appellees Center for Public Financing of Elections, Common Cause, League of Women Voters of the United States, et al. 65-74, 81-88, Buckley v. Valeo, 424 U.S. 1 (1976); Leventhal, supra note 3, at 361-62, 367-72.

[190] Justice White observed in his *Buckley* dissent that "[t]he ceiling on campaign expenditures represents the considered judgment of Congress that elections are to be decided among candidates none of whom has overpowering advantage by reason of a huge campaign war chest." 424 U.S. at 265 (White, J., dissenting).

The financial structuring of political contests, like the allocation of access to the broadcast media, undeniably produces a tension between competing first amendment values. Those with unlimited resources have a colorable first amendment claim to be free to decide how, where, and when to spend their money to advertise their candidates and political viewpoints. But the first amendment analysis does not end with the identification of a single first amendment interest. In resolving the first amendment conflict, the *Red Lion* principle supplies the appropriate rule of decision. The interests of the listeners in hearing a broad range of ideas are paramount. In *Buckley* and *Bellotti*, however, the Court paid only lip service to the rights of listeners[191] and limited the *Red Lion* principle to the regulation of the media.[192] Its primary solicitude was given to the privileged few who can spend unlimited amounts of money to purchase political effectiveness, rather than to the listeners—the citizens who, by their vote, perform the most important of public duties.[193]

The Court's one-sided reconciliation of competing first amendment values is particularly skewed—if not perverse—in *Bellotti*. In giving strong first amendment protection to corporations, it ignored Justice White's sound reminder that

> [c]orporations are artificial entities created by law for the purpose of furthering certain economic goals. . . . It has long been recognized . . . that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.[194]

The inevitable result of the growth of corporate political power and influence, and its effective sanction by the Court, was recently analyzed by Archibald Cox.

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[191] In *Buckley*, the Court wrote, "In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign." 424 U.S. at 57. In *Bellotti*, the Court declared, "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." 435 U.S. at 791. The Court was apparently oblivious to the fact that the citizens, acting collectively through their elected representatives, had adopted the challenged legislation in order to protect their rights as listeners. Cf. Leventhal, supra note 3, at 368.

[192] *Buckley*, 424 U.S. at 49-50 n.55.

[193] See A. Meiklejohn, supra note 102, at 24-25 (comparing first amendment protection of speech by all citizens with speech or debate clause immunity for speech by legislators).

[194] 435 U.S. at 809 (White, J., dissenting); see Brudney, Business Corporations and Stockholders' Rights Under the First Amendment, 91 Yale L.J. 235, 237-38, 240-41 (1982) (discussing political influence of corporate wealth and nature of corporate entities); Note, supra note 137, at 1853-60 (arguing that *Bellotti*'s emphasis on formal equality and its protection of corporate power reflect the spirit of pre-1937 economic due process jurisprudence, and contending that corporate speech rights do little if anything to serve genuine speech interests).

> If liberty means the opportunity of the individual man or woman to express himself or herself in a society in which ideas are judged principally by their merit, increasing the relative influence of organizations with large financial resources and shrinking the attention paid to truly individual voices means a net loss of human freedom.[195]

Such an outcome is fundamentally inconsistent with the underlying principles of the first amendment.

To return to the question: Is the first amendment an obstacle to democratic equality? The answer to me is clear. Liberty and equality must complement each other as equally indispensable linchpins of an open, democratic society. As Kenneth Karst has written,[196] and as the foregoing discussion of first amendment theory implies, equality is part of the central meaning of the first amendment and underlies each of its most important purposes.[197]

Indeed, instead of asking the defeatist question, "Is the first amendment an *obstacle* to democratic equality?" We should be asking, "How must we interpret and implement the first amendment in order to *enhance* equality?" In a world of advancing technology, scarce resources, and practical barriers to full freedom of discussion, we must not look at the first amendment solely as a negative prohibition. Although freedom of speech has generally been perceived as a limitation on government, I agree with Professor Emerson that the frontier of the first amendment today is the need for affirmative measures by government to protect, preserve, and enhance freedom of expression.[198]

IV. Remedies

Recognizing that fundamental principles of political equality are inseparable from first amendment values, the American people, the Congress, and the courts must make a concerted and timely effort to cleanse our body politic. Without providing detailed prescriptions, I would like to point to avenues of reform that respond to the grievous problems described earlier in this Article.

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[195] Cox, Foreword: Freedom of Expression in the Burger Court, 94 Harv. L. Rev. 1, 70 (1980).

[196] Karst, supra note 181.

[197] Id. at 23.

[198] T. Emerson, supra note 144, at 627-30. Emerson notes that "[s]earch for the truth is handicapped because much of the argument is never heard or heard only weakly. Political decisions are distorted because the views of some citizens never reach other citizens, and feedback to the government is feeble." Under these circumstances, he urges, "it becomes essential, if the system [of freedom of expression] is to survive, that a search be made for ways to use the law and legal institutions in an affirmative program to restore the system to effective working order." Id. at 628-29.

See Z. Chafee, Free Speech in the United States, supra note 151, at 559-60; A. Meiklejohn, supra note 102, at 16-17, 104 (freedom of speech must not be given merely a negative meaning); Barron, supra note 168, at 1641 (marketplace of ideas is not self-operating); id. at 1654-56 ("Creating opportunities for expression is as important as ensuring the right to express ideas without fear of governmental reprisal.").

First, there is the alarming influence of political action committees sponsored by special interests. PAC's have taken a dominant position in the process of electing senators and congressmen and are increasingly active at the state level. It is vital to reduce their undue influence on candidates and, through candidates, on legislation. Congress should reduce the legal ceiling on the amount that each PAC may give to any candidate, and the amount that any candidate may receive from all PAC's taken together.[199] We should recognize that PAC contributions and expenditures inflict the same evils on the body politic as direct contributions and expenditures by corporations and labor unions, which have been banned by federal law for decades.[200]

Second, there is the growing cost of political campaigns, which tends to foster inequalities in spending, and thus to distort the political debate and to exclude all but the wealthy or the well-financed from running for office. The best and most comprehensive remedy would be public financing of political campaigns for the House and Senate.[201] Public financing may constitutionally be accompanied by limits on spending and contributions.[202] With one stroke public financing legislation could do much to remove the poison of money from the political bloodstream—even within the confines of the narrow constitutional limitations the present Supreme Court imposes on us.

If public financing is not enacted, less comprehensive stopgap measures should be considered. Given the prominent share of media spending in campaign budgets, reducing the cost of access to the media would do much to alleviate the blight of rising campaign costs and the resulting inequalities.

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[199] In the fall of 1979, the House of Representatives passed the Obey-Railsback bill, which would have lowered the permissible PAC contribution to a House candidate during an election cycle from $10,000 to $6,000 and would have created a $70,000 ceiling on the aggregate contributions from all PAC's to a House candidate. A filibuster threat blocked the bill in the Senate. See Alexander, The Obey-Railsback Bill: Its Genesis and Early History, 22 Ariz. L. Rev. 653, 663-65 (1980); Railsback, Congressional Responses to Obey-Railsback, 22 Ariz. L. Rev. 667 (1980); Kenski, supra note 38.

[200] See supra note 34. In *Bellotti* the Court was careful to distinguish the prohibition on referendum spending by corporations, which it was invalidating, from the Corrupt Practices Act's ban on corporate spending in candidate campaigns, which it did not reach.

> The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. . . . The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.

435 U.S. at 788 n.26.

[201] See F. Wertheimer & R. Huwa, supra note 31, at 11; Chevigny, supra note 55, at 221-25 (discussing advantages and disadvantages of various public financing schemes).

The Court has held that the public must bear the cost of administering primary elections; the same policies support public funding of campaigns. "Viewing the myriad governmental functions supported from general revenues," the Court stated, "it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern." Bullock v. Carter, 405 U.S. 134, 148-49 (1972).

[202] *Buckley*, 424 U.S. at 57 n.65 (candidate may voluntarily refuse public funding and therefore avoid subjection to spending limits); Republican Nat'l Comm. v. FEC, 487 F. Supp. 280 (S.D.N.Y.) (three-judge district court), aff'd mem. 445 U.S. 955 (1980) (rejecting first amendment challenge to spending limits upon presidential candidate who accepts public funds).

Government control over the broadcast media is pervasive; reductions in the cost of political campaign advertising would be well within the power of Congress and well within the first amendment.[203] Congress should also consider requiring broadcasters to provide specified amounts of free television and radio time to recognized candidates.[204] The Fairness Doctrine should be preserved and strengthened, so that the networks and licensees bear responsibility for assuring reasonably balanced presentations in candidate and issue campaigns.[205]

All of these measures are probably within the Supreme Court's cramped version of the Constitution. But the Court's warped interpretation of the first amendment proscribes some of society's most powerful defenses against the polluting influence of money. *Buckley* unconditionally condemns limitations on overall candidate spending, spending from personal and family resources, and independent spending activity for or against specified candidates.[206] *Bellotti* gives corporations the right to spend money in political-issue referendum campaigns, even those totally unrelated to corporate business.[207] Yet spending limits are an essential weapon against gross inequalities in campaign communications. Although public funding is a workable remedy for candidate contests, in referendum and initiative campaigns it might well be impracticable as a comprehensive solution. In these political contests, the only way to prevent distorting inequalities in campaign spending may be the imposition of spending limits at a level high enough to assure adequate debate but low enough to permit all views to find clear, unstifled expression. Clinging to its tragic misconception of money as speech, however, the Court condemns the American electorate to distorted political perceptions arising from one-sided political campaigns. I fervently hope that, as the evidence mounts that the political process is in trouble, the Supreme Court will be moved to alter its position.

CONCLUSION

The Supreme Court, of course, says what the law is. But on a number of occasions in the past when the Court's doctrine has been both wrong and harmful, the pressure of sharply-etched needs has made it clear, first to observers and then to the Court itself, that the doctrine must be changed. Such was the case in the late 1930's when the Court began to uphold New Deal legislation,[208] and such was the case in 1954 when the Court overruled *Plessy v. Ferguson.*[209]

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[203] See A. Rosenthal, supra note 59, at 62; F. Wertheimer & R. Huwa, supra note 71, at 29-32 (discussing proposed reduction in maximum unit cost for political campaign ads on television).

[204] See L. Sabato, supra note 75, at 327 (discussing British system of free television broadcasts on all channels for political parties during election campaigns); F. Wertheimer & R. Huwa, supra note 71, at 22-24 (discussing proposal to require television licensees to supply free time to qualifying candidates). Dean Rosenthal has concluded that such requirements would be constitutional; Congress's power to ensure that licensees used their facilities in the public interest would "undoubtedly be sufficiently broad to sustain the provision." A. Rosenthal, supra note 59, at 62-63; Rosenthal, supra note 126, at 422.

[205] See Mastro, Costlow & Sanchez, supra note 86, at 327-49 (Media Access Project's proposals for strengthening Fairness Doctrine in referendum campaigns).

The Fairness Doctrine is currently under attack by some members of the FCC. See Broadcasting, Nov. 2, 1981, at 36. But its repeal would eviscerate the reality, limited as it now is, of "robust, uninhibited, wide-open" debate. See Barron, supra note 168.

[206] 424 U.S. at 39-59.

[207] 435 U.S. at 765.

The growing impact of concentrated wealth on the political process, and the glaring inequalities in political campaign resources, threaten the very essence of political equality. The warning signs are plain for all to see. Today's threat to democracy is not the impending collapse of the structure of democratic institutions, but their continuing erosion from within. If this erosion is not checked, the principle of one person, one vote could become nothing more than a pious fraud. Ironically, the underpinnings of our democratic system are being menaced by decisions made by the Supreme Court in the name of the liberties of the first amendment.

The words I wrote in 1975 to close our Court of Appeals decision in *Buckley* did not then move the majority of the Supreme Court. Their message, however, has gained new urgency with the accumulated political experience of the intervening years:

> Our democracy has moved a long way from the town hall, one man, one vote conception of the Framers. Politics has become a growth industry and a way of life for millions of Americans. The corrosive influence of money blights our democratic processes. We have not been sufficiently vigilant; we have failed to remind ourselves, as we moved from town halls to today's quadrennial Romanesque political extravagances, that politics is neither an end in itself nor a means for subverting the will of the people.[210]

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[208] See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942) (recognizing broad scope of commerce clause); United States v. Darby, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act); Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (upholding Social Security Act); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding National Labor Relations Act).

[209] Brown v. Board of Educ., 347 U.S. 483 (1954), overruling Plessy v. Ferguson, 163 U.S. 537 (1896).

[210] 519 F.2d 821, 897 (D.C. Cir. 1975), rev'd in part, 424 U.S. 1 (1976).

CAN THERE BE CONSTITUTIONAL LIMITS ON FREEDOM OF SPEECH?

Representative **Reuss**. Mr. Cutler, do you think there can be constitutional limits on freedom of speech? After all, we do have libel laws. We do have election laws. We do have laws imposing some conditions on that point at which liberty of speech becomes license.

Mr. **Cutler**. We even have laws that explicitly forbid corporations and labor unions from contributing or spending in political campaigns. These are not limits. These are total bars. And yet the Supreme Court has never disturbed those over 40 years, although, inspired by Buckley, a case testing whether corporations may make direct political contributions to candidates is now pending in the lower courts.

Representative **Reuss**. Mr. Reedy, is the right of freedom of speech an absolute right or one that is subject to qualification in terms of justice?

Mr. **Reedy**. I have to be very careful in my answer, Mr. Chairman.

Representative **Reuss**. You come from a Jesuit institution, so you ought to be very good at it.

Mr. **Reedy**. I will be very Jesuitical. Frankly, I cannot believe there could be any limitation on the right of free speech.

I think, however, that there can be limitations on the manner in which the free speech is transmitted. In other words, the examples that we have been given so far, that of the corporation or that of the labor union—and I am in full agreement with those particular laws—I think the point there is those laws are going to free speech as transmitted through an artificial entity, through the corporation or the labor union, which is a synthetic thing.

The individual members of that labor union, the individual members of that corporation certainly are not restricted in any other way.

I would also like to go to the question of my right to holler "fire" in a crowded theater. That has always struck me as being a very poor example. I am surprised that such a statement was made by such an intelligent person because you cannot prevent me from shouting "fire" in a crowded theater if I am determined to shout "fire."

It seems to me that if a person is willing to risk being trampled, no amount of court injunctions is going to stop that person from shouting "fire." It is an ineffective injunction, in effect.

But I do think we have to get back to a very basic distinction. Free speech—no, I believe that is absolute. The method through which the speech is transmitted or the audience to which it is delivered—that, I believe is subject to reasonable limitations, if you will forgive me for being Jesuitical, sir.

PERFORMANCE OF FOREIGN PARLIAMENTARY GOVERNMENTS

Representative **Reuss**. Mr. Cutler, you have put on the table certain propositions which partake in part of certain aspects of the parliamentary system; namely, coterminous terms for the President and Congress, some sort of reciprocal methods of dissolving the legislature and having elections, some methods of harmonizing the executive and the legislature as by letting members of the legislature sit in the Cabinet.

What do you say to those who resist you by pointing to certain unsatisfactory parliamentary systems as they now exist in the world today. Thus, "Look at Germany, they have a parliamentary system, yet they are immobilized for the next 4 or 5 crucial months," or "Look at the United Kingdom, they have a parliamentary system, yet the Labour Party is locked into diametrically opposed right and left elements, and an important group of labor has spun off into a third party, Social Democrats," and so on.

One could go on, but you know what I am talking about. How do you answer?

Mr. CUTLER. I would answer that, Mr. Chairman, by admitting in the beginning that in the art or science of politics or devising forms of government, there are no double-blind tests.

We have numerous cases, of course, in which systems that work very well for us work very badly in other countries. Reference was made a few moments ago to the fact that features of the American Constitution are copied all over Latin America and around the world.

The Supreme Court of Argentina has the precise powers to declare acts of officials unconstitutional as the Supreme Court of the United States. It was modeled that way. And yet look what has happened over the years.

To say that a 6-year term "gave you Allende" in Chile would be like saying if there had been a 4-year term in Chile and it "gave you Allende" then a 4-year term is bad. Arguments like that don't make any sense.

There are undoubtedly features of the British Government that don't work very well. One of the benefits of our separation of powers is the ability to check an arbitrary or corrupt President, as we learned only a few years ago, something that perhaps couldn't have been done under the British system.

But what has happened to us that we now feel we have received an "Ark of the Covenant" from these practical 55 men of 200 years ago, not one syllable of which must be touched. They were very brave men. They took part in a revolution. They believed that governments were things that had to be adapted to the views and the best interests of the people and that, as conditions change, governments had to adapt their forms to meet the changed conditions. They might agree or disagree with some of the various proposals for changing the system that they built, but they would certainly never say to us that that system which we transferred to you we meant to last forever.

Mr. REEDY. I have one thing to correct the record. If they had the 4-year unlimited terms in Chile, they would not have had Mr. Allende, because it was very obvious to anyone down there that Eduardo Frei was a man of tremendous capability, a man with a capacity to run the Government, a man with the confidence of the Chilean people, and what happened was they couldn't vote for him. They had really precluded themselves from voting for the only man at that time, under those circumstances, who really had their confidence. They had to choose between three men, and they fell into that sewer.

Mr. **Cutler**. Therefore, we made a great mistake with a two-term——

Mr. **Reedy**. I think we did.

Mr. **Cutler**. All over the world incumbents get voted out in favor of new people. That is going to keep on happening no matter what we do to the Constitution.

POLITICAL PARTY RESPONSIBILITY

Representative **Reuss**. Let me now come to my last question, because the hour is getting late.

All members of the panel differ as to whether constitutional changes are needed. But I think you all agree that a greater sense of party responsibility would be a good thing for the Republic, whether or not we get that sense of party responsibility by adopting parts of a parliamentary system.

Let me ask this practical question about my party, the Democratic Party. I guess it is improper for me to talk about the organization of the Republican Party. Most people think that the Democratic Party nowadays is not terribly responsible.

There are the House Democrats, the Senate Democrats, the Democratic National Committee, State Democratic Parties, the great loose body of citizens who think of themselves as being Democrats.

In the congressional Democrats we find very little impulse to require party loyalty of Members of Congress. For example, in the last Congess prominent boll weevils were placed in the seats of the mighty on the committees. In the last Congress non-boll weevil dissidents who did not follow general democratic policy were nevertheless given party support in their campaigns for reelection against challengers who criticized them for nonadherence to party loyalty; and, indeed, they were given party campaign contributions.

Let me ask, Mr. Reedy, do you think the Democratic Party ought to pull up its socks a bit and even under the present system ask for greater loyalty in the Congress—for example, simply make it clear that on major policy questions Members of Congress ought rightfully be expected to follow the party positions and if they don't they will not be rewarded with patronage, committee chairmanships, committee assignments, campaign endorsements, campaign contributions, and other perquisites of power?

Mr. **Reedy**. Mr. Chairman, my answer is a little bit complex. I think it would be nice, but I don't think it is going to happen for a very simple reason. I believe there is a symbiotic relationship between the nature of political parties and the form of government.

I think we have a form of government which makes it absolutely impossible to have the disciplined type of party loyalty that one has under a parliamentary regime.

To have the kind of political party that does succumb to discipline will require a very thoroughgoing revision of our Constitution because there is a problem. The problem is that we have no device to form a coalition in the executive branch of our Government.

Consequently, what we have done, in my judgment by a process of evolution, is to introduce the coalition aspect at the party level.

In other words, I regard our two political parties as being fundamentally filtration devices which do cancel out the left and the right and which do give us at least coalition combinations.

I myself am rather fond of the parliamentary system of government. I just think it is too late to do anything about it. That is my difficulty with it.

But I have a feeling that no matter how hard we try we are not going to get disciplined political parties. What discipline we have had in the United States, if one examines it historically, has gone back to three factors; first of all, the big city political machines, which primarily were an extension of the Irish clan system that was brought over here by my ancestors; second, the Grand Army of the Republic, which for a long time was the basic backbone and gave some cohesion to the Republican Party; third, in the South, the desire to use political parties as a device to sustain segregation.

As the big city political machines have collapsed, that has ended that aspect of political party integration. As the GAR has finally died off and their sons have died off, that has ended that aspect of political party integration. And as the civil rights movement has put an end to legal segregation in the South, that has ended that aspect of political discipline.

Mr. Chairman, I think this is one thing where if we seriously intend to get political parties, yes, then we must go to very deep-seated constitutional reforms; and if we do, I invite you to look at what happened to France in 1975 when they did it.

Representative REUSS. Mr. Cutler, would you comment on that?

Mr. CUTLER. I am much more on your side of this question, I think, than Mr. Reedy, Mr. Chairman. But you would have to add to your litany of Members of the House, for example, being able to vote their own views in contrast to the views of the party leadership, or to a party caucus view. You would have to add the disparities between the same party's leaders in the two Houses of Congress.

I give you some sort of laboratory example of how parties ought not to work; that when the 1982 tax bill came along, which was an essential reversal of President Reagan's 1981 tax cut, the Democratic leadership in the House supported the President on this 1982 tax increase—I happen to think rightfully—and the Democratic leadership in the Senate opposed it.

So we have the two leaderships of the same party on opposite sides of an issue which, had they been together, could have been a great victory for the Democratic Party and a position; that is, a policy, for governing on the part of the opposition in contrast to the President's policy for governing.

We have no such thing today as an opposition policy for governing put forth by the opposition party in Congress. It just doesn't exist.

Representative REUSS. We are grateful to you for a memorable morning. Our inquiry is well launched. We will resume a week from tomorrow, Wednesday, November 17, in this place, where we will hear from former Secretary Dillon, former Senator Fulbright, Elliot Richardson, Arthur Schlesinger, Jr., former Senator Hugh Scott, and from Richard L. Strout of the Christian Science Monitor.

Then the next day, also here, on November 18, we will hear from James McGregor Burns, Henry Steele Commager, Ferdinand Hermens, and James Sundquist.

We now stand in recess until Wednesday, November 17, 1982.

[Whereupon, at 12:25 p.m., the committee recessed, to reconvene at 10 a.m., Wednesday, November 17, 1982.]

POLITICAL ECONOMY AND CONSTITUTIONAL REFORM

WEDNESDAY, NOVEMBER 17, 1982

Congress of the United States,
Joint Economic Committee,
Washington, D.C.

The committee met, pursuant to recess, at 10 a.m., in room 2128, Rayburn House Office Building, Hon. Henry S. Reuss (chairman of the committee) presiding.

Present: Representative Reuss.

Also present: James K. Galbraith, executive director; Louis C. Krauthoff II, assistant director; and William R. Buechner and Chris Frenze, professional staff members.

OPENING STATEMENT OF REPRESENTATIVE REUSS, CHAIRMAN

Representative Reuss. Good morning.

The Joint Economic Committee will be in session for a continuation of its hearings on the political economy.

Our inquiry takes advantage of the fact that in 1987 comes the 200th anniversary of the adoption of the Constitution. We thought it timely to inquire into the state of economics and politics.

Today, on the eve of that anniversary, the great questions are whether, if the Government gets worse, that will affect the economy; and if the economy gets worse, that will affect the government.

We have, this morning a most distinguished group of old friends with us, former Secretary of the Treasury Douglas Dillon; former Senator J. William Fulbright; former Senator Hugh Scott; Elliot Richardson, Ambassador and former Cabinet Member; Arthur Schlesinger, Jr., historian, writer, educator; and Richard L. Strout, the beloved correspondent of the Christian Science Monitor.

Gentlemen, we are honored to have you with us.

Many of you have presented us with written statements which, under the rule and without objection, will be received in full into the record.

We would now like to ask you to proceed in any way you choose. And at the conclusion of your testimony, we will invite you, the panel, to interchange with each other. I am sure that we will have some questions to ask of you.

First, Mr. Douglas Dillon.

STATEMENT OF C. DOUGLAS DILLON, FORMER SECRETARY OF THE TREASURY

Mr. Dillon. Thank you, Mr. Chairman.

I am delighted to be here. I think these hearings are a tribute to the farsightedness which you, Mr. Chairman, have always shown in your many years here. And I want to express my personal regret at your decision to leave these august premises. However, I think this is a very fitting inquiry.

CURRENT GOVERNMENT STRUCTURE—PROBLEMS AND ISSUES

I do not have a formal statement to submit since I think you heard at your previous session from Mr. Lloyd Cutler, who, together with me, has served as sort of organizer of a group calling themselves Committee on the Constitutional System, which had a meeting with some 35 people here in Washington late in October and is designed to promote study and analysis of the structure of our Government, including, in particular, possible constitutional changes which might improve that function. I have felt this way for a number of years. And indeed, it was almost 3 years ago when I first spoke out before the National Institute of Social Services in New York, feeling basically the obvious difficulties that we were having with our system in developing effective overall programs in the economic and foreign policy area.

Maybe it was not due to some extraordinary genius of electing incapable people to represent us, but rather due to the fact that however capable—and I think the great majority of them are extremely capable, our representatives in office, from the President on down—but that there might be some structural problems in our Government that could be improved over the setup we reached 200 years ago in quite different circumstances.

I thought it might be helpful if I merely submitted for the record a copy of the remarks I made at that time at the National Institute of Social Services, as well as a brief column that followed that by James Reston, in the New York Times, commenting on my statement, and also a copy of the talk I gave at the Fletcher School of Diplomacy last spring on May 30, at the time I was awarded an honorary degree by Tufts University.

Representative Reuss. Without objection, the three documents referred to will be included in the record at this point.

[The documents referred to follow:]

Remarks by Douglas Dillon Before the National Institute of Social Services, New York, N.Y., December 6, 1979

The last few weeks, with the difficult situations at our Embassies in Teheran, Islamabad and Tripoli, have led me to share with you some of my thoughts on our Government as it functions today.

Although we do not generally recognize the fact, what we are suffering from today is not incompetence in our Foreign Service, or in our intelligence services or in the office of the President. Unfortunately our problem gives every sign of being much more serious than that. It is, in my view, the beginnings of what our French friends would call a "Crise de Regime", which is best translated as a crisis in the operation of our basic system of government.

A hundred and ninety years ago when our founding fathers were debating the form of a Constitution to replace our former colonial status, their primary fear was centralized power, operating far from the thoughts and wishes of the people. At that time it took several weeks to travel from Boston or Georgia to our new Capital which seemed very far away and remote. Accordingly, a Constitution was devised that divided power in a new and unprecedented manner between the legislative, executive and judicial branches of government.

This remarkable and unique system worked very well until quite recently. It provided the necessary safety valves during the century and a half when our nation was able to grow in relative isolation. And it continued to work in the period immediately following World War II, when our military and economic power dominated the world scene.

But now things have changed. Isolation is no longer possible or desirable and our military and economic dominance are both gone, probably forever. We must learn to accustom ourselves to a new world, a world in which actions taken by others can have rapid and serious effects on our economy and on our standard of living, a world in which others have the military means to destroy our nation whenever they are prepared to accept the consequences.

It is hard to make this shift in our thinking, and it is only natural to look for scapegoats. But that will not answer the problems that face us today and will continue to face us in the years ahead. Instead we must begin to reorganize for the future. That future will be a world in which the United States will be faced with recurring crises of kinds that cannot possibly be foreseen, crises that will test our will and our fortitude and which will require prompt and united responses from our nation. I very much doubt that in such a world we can long continue to afford the luxury of the division of power and responsibility between our executive and legislative branches of government which, since the founding of our Republic, has differentiated our system from the parliamentary system generally used in other democratic countries.

I have no pat answer. But I do know that until we are prepared to examine the basic structure of our federal system and its functioning in today's world rather than indulging ourselves in continuous personal and political recriminations, our problems will remain with us and, in all probability, increase in severity. It is my deep and great hope that we as a nation will undertake this reexamination before it is forced upon us by an overwhelming crisis that no one wishes to contemplate. If we do, I have confidence that we Americans will find an answer that will both preserve our liberties and guide us through the rough times that lie ahead.

[From the New York Times, Dec. 23, 1979]

WHERE ARE WE GOING?

(By James Reston)

WASHINGTON.—This is a troubled city at the end of the 1970's because it is leading a life of pretense. It is anxious, not primarily because of its immediate problems at home and abroad, but because of a growing conviction that it is dealing with a world of divided national states that is out of control, and that the Government is not working effectively on the challenges of the 80's.

Put more simply, what is bothering throughtful people in both parties here is that the world changed faster in the 70's then we have been able to change ourselves; that the prevailing attitudes of our people and the assumptions of our institutions, including the divided responsibilities of the Federal Government, are out of date.

There is a vague understanding here that some kind of major transformation took place in the world of the 70's; that the United States was no longer self-sufficient in the resources essential to sustain its industrial growth; that it was no longer the most productive or most successful nation in the export markets of the world; and maybe not even the undisputed military or moral leader in the shifting balance of a rapidly changing world.

But Washington has not been able to adjust to these fundamental changes. It has been trying to deal with them as if they were a passing phase which could be corrected by a larger defense budget, or by blaming Carter and substituting Kennedy or Reagan or Connally or somebody else who would make the rest of the globe shape up to our ideals and interests.

Meanwhile, as Congress scatters for the Christmas holidays, depriving us of its advice (which may not be an intolerable loss), we clearly need a little time at the turn of the year to sort out and redefine our problems and priorities. The OPEC nations and Ayatollah Khomeini are trying to tell us something: namely, that we are confronted not only by the growing power of Soviet missiles in Eastern Europe, and by Moscow's naval power in the oceans of the world, but by the economic power of the oil-producing nations, and the philosophic challenge of Islam to the materialism of the West.

The political debates raging in the headlines of the world's press these days—in Iran and elsewhere—do not really deal with the deeper and more tragic tides running under the surface. The world is being changed, not primarily by the ayatollahs or even by the contemporary leaders of the principal industrial states. The world is being changed by the fertility of the human body and the mind; by ordinary people who produce more children then they can feed and educate; by science that preserves life at the beginning and prolongs it at the end, leaving to the politicians the problem of finding remedies for this deluge.

Where the politicians as well as the teachers and preachers and reporters and editors can be faulted, is in failing to make this fundamental fact clear to the people as the central question for decision. Here in Washington, for example, at the end of the old year and decade, we are preoccupied, and understandably so, with the lives of some 50 American captives in Teheran. So, too, we confront the paradox of increasing the United States defense budget in order to control the arms race; and the struggle for the American Presidency among a group of men who have been talking about transitory issues, as if nothing had changed—and if it had, it was somebody else's fault.

But under the surface of these arguments, there are serious people with long experience in Washington and elsewhere who recognize structural defects in our Government that must be repaired if we are to deal with our present and coming problems.

This is not a partisan or ideological observation. For example, Douglas Dillon, former Under Secretary of State and Secretary of the Treasury, called the other day before the National Institute of Social Services in New York for a reappraisal of our thought and government to deal with all these changing problems:

"What we are suffering from today," he said, "is not incompetence in our Foreign Service, or in our intelligence services or in the office of the President. Unfortunately our problem gives every sign of being much more serious than that. It is, in my view, the beginnings of a crisis in the operation of our basic system of government.

"We must learn to accustom ourselves to a new world, a world in which actions taken by others can have rapid and serious effects on our economy and on our standard of living, a world in which others have the military means to destroy our nation whenever they are prepared to accept the consequences. I very much doubt," Mr. Dillon concluded, "that in such a world we can long continue to afford the luxury of the division of power and responsibility between our Executive and Legislative branches of government. . . . I have no pat answer. But I do know that until we are prepared to examine the basic structure of our Federal system and its functioning in today's world rather than indulging oursleves in continuous personal and political recriminations, our problems will remain with us and, in all probability, increase in severity."

REMARKS by DOUGLAS DILLON
Fletcher School of Diplomacy
Tufts University - May 30, 1982

Today I want to share with you some thoughts on a subject that has concerned me ever since I left government service, 17 years ago. It is our unique, American, Constitutional system and its present and future ability to handle the increasingly complex problems that face our nation today and will face us in the years to come.

Before going any further, let us reflect a minute on what separates our system from other democratic systems. Where our Constitution differs fundamentally from the other major democracies is in the separation of executive and legislative power. When our founding fathers were drafting the Constitution they had just been through a war to overthrow the power of a ruler, who lived far away across the seas, to determine their destinies. The thirteen, newly independent colonies had many differences and treasured their individual freedom. As states in a new union they were not about to give authority to a distant central government to determine their fate. And in those days Washington, the new capital, was, indeed, far away. It took something like a full month to travel in unhurried fashion from Boston or Savannah to Washington -- and at least a week for news to cover the same distance in the most rapid manner available.

Therefore our system of checks and balances between the executive authority and the legislative authority was devised. This system contrasts sharply with the parliamentary system as it developed in Europe, wherein the legislative and executive authority are combined, with the government possessing both types of authority at the same time.

Our Constitutional system worked as expected and served us well for over 150 years. It is only since World War Two that serious strains began to appear. The basic reasons for these strains lie in the technological developments that make life, and in particular political life, quite different today from what it was only fifty years ago. These developments have annihilated time and distance. I refer to the airplane, in particular the jet airplane, and the development of television and inexpensive, instantaneous, communications networks that cover our entire nation and, indeed, the globe.

In earlier days members of Congress were elected and sent to Washington to represent their constituencies. Communication was slow and there was no way in which the Congressman or Senator could ascertain the views of his constituents on the many individual matters that would require decision while in Washington. Members of Congress were chosen because of their philosophic approach to government or more rarely because of their views on some one, dominating issue of the day. Because of this, political parties developed that had a certain cohesiveness and that gave the voters a relatively clear idea of where their members stood on the issues. Thus, party government in the first 150 years of our national existence was not too different from that in parliamentary governments. The power of the executive was held in check, but the basic programs of the President and his party were generally enacted. There were exceptions, of course, such as the rejection of the League of Nations after World War I. But these were exceptions, not the rule.

Things began to change after World War II. Because of faster means of travel, members of Congress spent more time at home, in their districts, and, because of the telephone and the news media, they were in constant touch with constituents who were informed on a day to day, if not an hour to hour, basis as to developments in Washington. Gradually but steadily there was an erosion in party loyalty. Political parties began to lose their ideological identies. We are all aware of the profound differences between the thinking of elected southern Democrats and their colleagues from the big cities of the North. And similar differences arose between Republicans elected to office in the East and those coming from the middle and far West.

So what do we have today. We have members of Congress who return to their districts regularly, when possible every week -- members who are in close touch with the vocal elements in their districts and who, of necessity, put the expressed interests of such constituents ahead of any broader national or party interest. Only the President has a national constituency, but he has no authority to put his policies in place or to see that they are carried out. All he can do is to exhort and hope that this will bring pressure on the Congress to act.

An outgrowth of this situation has been the rise of single issue, special interest groups. Their number is legion. There is the gun lobby, the right to life lobby, the environmentalists, the anti-nuclear groups. Recently we have heard much of the power of these special interests groups. What we should realize is that their power and their existence is a natural outgrowth of our fractionated political system, where local pressures far outweigh any overall and necessarily abstruse national interest. One of the best characterizations of this situation has recently been given by Speaker Tip O'Neill who is quoted as saying, "All politics is local politics".

Another characteristic of our system is the inability to place responsibility on any one person or group. The President is elected every four years on a program for which he feels that he has a mandate. But the Congress, be it controlled by his own party or the opposition, practically never implements these policies. We have to go back 50 years to Franklin Roosevelt and the New Deal, to find a time when the President has been able to develop a program and have it adopted by the Congress. President Reagan, by his success last year, came nearer than anyone to repeating the Roosevelt success story but now seems to be facing the same problems as his predecessors.

The result of all this is stalemate whenever important and difficult issues are involved. And no one can place the blame. The President blames the Congress, the Congress blames the President, and the public remains confused and disgusted with government in Washington. An interesting sidelight on this public perception of government is the extraordinarily low esteem in which the Congress is held. In various opinion polls only 10 to 15 percent of those polled feel that Congress is doing a good job. But at the very same time a majority usually give high marks to their own Representative or Senator. This clearly indicates that our governmental problems do not lie with the quality or character of our elected representatives, a substantial majority of whom are well meaning, hard working individuals of more than average ability. Rather they lie with a system which promotes divisiveness and makes it difficult, if not impossible, to develop truly national policies.

Another outgrowth of this situation is voter apathy. The public has come to realize that national political platforms are relatively meaningless. Even when a President has tried to carry out the promises in the platform after his election, he has, more often than not, been frustrated by Congressional opposition. The success ratio has not been good. So it is natural for a feeling to grow that it makes little difference who is elected, and hence why bother to vote. This is certainly one of the chief reasons why the United States ranks at or near the bottom among the industrialized democracies in the percentage of citizens of voting age who actually go to the polls and exercise their franchise.

The problems of our present system have been and are vividly illustrated by the current difficulties with our national budget. Nothing could be more important to the health of our Nation. The deficits that loom ahead are of incredible magnitude. Unless they are sharply reduced from the $250 billion level that we are facing only three years hence, there can be only two results, both of them very bad. One is continued high and probably ever higher interest rates, as federal government borrowing absorbs practically all private savings, leaving little or nothing for business or state and local use. Such a scenario would guaranty continuation of recession and high unemployment and could even lead to a depression comparable to that of the thirties. The only other possible result is financing the deficits through money, hot off the printing presses, leading inevitably to roaring inflation of a type not seen in any industrialized country, in peace time, since the great German inflation of the inter-war period.

To handle the situation we clearly need increased tax revenues and reductions in spending in approximately equal proportions. Adequate spending reductions simply cannot be achieved without a reduction in the growth of the entitlement programs, including Social Security. There is no time to waste, but, in spite of the seriousness of the situation, there is every indication that we will have to wait until after the November election before any of the major issues will even be seriously discussed. All we have is more politics as usual, which comes close to fiddling as Rome burns. And this is not because of any lack of knowledge as to what needs to be done, which is perfectly clear. Rather it stems from the inability of our system to clearly place the responsibility for action in any one place.

Other illustrations of this sort are too numerous to list. One can point to the failure to take needed action on energy legislation in the mid-seventies, the failure to act on Social Security when everyone is aware that the system is rapidly going bankrupt and the failure to enact handgun control legislation, when all polls show that it is desired by at least three quarters of the electorate.

Another major problem area, which should be of special interest to you at the Fletcher School, is that of foreign relations. In an increasingly interdependent world, facing increasingly complex problems, it is essential for a nation with the economic, military and political power of the United States to be able to speak with one, clear voice.

In the turbulent world in which we live today there is no doubt that, as the years go by, our nation will be faced with recurring crises of types that cannot be foretold. Today, actions taken by others thousands of miles away can have the most serious impact on our economy and our way of life. We are no longer able to stand alone, but our fate is bound up with what happens elsewhere in the world. In such an era, our government must be able to act clearly and promptly in defense of our national interests, and, when it speaks, others should know that its policies will be carried out.

However, under our system of divided powers that is not now possible. There is no way in which the Congress can formulate or implement foreign policy, and there is no way for the President to have assurance that the Congress will support the Executive Brance in carrying out the policies formulated by it.

This situation is highly confusing to friend and foe alike and can lead foreign nations to miscalculations of our intentions that could easily have serious or even catastrophic consequences. In a recent interview, Sir Nicholas Henderson, the British Ambassador in Washington, was asked his views of our government. His comments are most illuminating, and I will share them with you. He said, and I quote, "You don't have a system of government. You have a maze of government. In (other countries) if you want to persuade the government.....or find out their point of view on something, it's quite clear where the power resides. It resides with the government.

"Here there's a whole maze of different corridors of power. There's the Administration. There's the Congress. There are the staffers. There's the press.....

"Here, because of your Constitution, because you never wanted another George III, you made sure that the executive did not have ultimate power.

Then, finishing politely, the Ambassador said, "That makes life in Washington for a foreigner very much more exciting, difficult and varied than anywhere else." Speaking more frankly he could have said, "that's what makes the life of a foreign diplomat in Washington so difficult, frustrating and dangerous."

This system was viable during the first 150 years of our history when we could and did exist in relative isolation. It continued to be viable in the immediate post-war era when our economic and military power dominated the world. But that is no longer the case. Today, possibly the most important longer range question facing us as a nation, a question transcending all immediate issues, is whether we can continue to afford the luxury of the separation of power in Washington between the executive and the legislative branches of our government.

You may ask, "What is the alternative?" The answer could well be some form of parliamentary democracy. Parliamentary systems vary from those where the chief of state is merely a protoclaire figurehead, to those such as France, where great power resides in the President. But all of them have one thing in common. Responsibility for policy and its execution lies clearly with the head of the government and his party, which stands or falls on its overall record. Legislators must follow the party line or face loss of party designation in the next election. As a result, individual issues tend to be submerged in the overall record of the government, which has far greater ability to act promptly and energetically in the face of a crisis, foreign or domestic, than is the case in Washington.

Such a significant shift in our Constitution is unlikely to come about except as a result of a crisis that is very grave indeed, one that I hope we never have to face. But we cannot be complacent, and, if such a crisis does come upon us, we should be as prepared as possible. That requires extensive thought and debate, led in the first instance by our academic community. There are many leading scholars today, interested in studying our Constitutional system with a view to improving the operations of government. The bulk of these studies are aimed at relatively modest changes, designed to make our present system work better. I refer to such things as a single, six year term for the President, four year terms for members of the House of Representatives or government financing of Congressional as well as Presidential elections.

Some or all of these changes may be helpful, and studies of this sort are important and well worth pursuing. However, they do not address the much more serious problem of the inability to place responsibility for events on any one party or person. That can only be remedied by a truly significant shift -- a change to some form of parliamentary government that would eliminate or sharply reduce the present division of authority between the executive and legislative arms of government. Ten years ago you could count on one hand the number of scholars who were prepared to tackle this subject. Today, I am glad to say, this has changed and there are many who are beginning to think in these terms.

This is all to the good. For unless our scholars and those who have had experience in government, explore, carefully and fully, the various parliamentary alternatives, we may some day find ourselves unprepared in the face of a major crisis. I recognize that this presents a difficult challenge, largely because it is hard to foresee the circumstances that would lead to such a drastic change in our Constitution. But it is a challenge that must be taken up, if we, as a nation, are to be ready for whatever the future may have in store.

Mr. **Dillon**. Thank you.

I will be glad to answer any questions that you might have.

Representative **Reuss**. I will have some based on what you have said this morning, and particularly on your Tufts speech, which I read with great interest and which belongs in any symposium on the subject.

Senator Fulbright.

STATEMENT OF J. WILLIAM FULBRIGHT, FORMER U.S. SENATOR

Mr. **Fulbright**. Well, Mr. Chairman, I appreciate being invited to your committee, especially in view of your own distinguished service.

I also have not prepared a statement of my own. However, as I told you the other day, I would like to submit for the record a very fine statement by Dr. Charles Hardin, with whom you are familiar, I think. I have given it to your clerk already.

Representative **Reuss**. Without objection, the entire statement will be inserted in the record at this point.

[The statement referred to follows:]

July 9, 1980

CONSTITUTIONAL REFORM IN THE UNITED STATES

Renewing the Debate

Charles M. Hardin, Department of Political Science
University of California, Davis

As in 1973-74 so in 1980 concern mounts over the adequacy of the United States Constitution. Congressmen Richard Bolling and Henry S. Reuss, Senator Patrick Moynihan and Walter Cronkite have all made statements declaring their concern. TRB of *The New Republic* (Richard Strout) has repeatedly returned to the issue. For the first time a number of political scientists in major universities have publicly urged America to consider the parliamentary system as an alternative. A forthright statement by C. Douglas Dillon called into question the central institution of the American version of the separation of powers:

"What we are suffering from today is not incompetence in our Foreign Service, or in our intelligence services or in the office of the President. Unfortunately our problem gives every sign of being much more serious than that. It is, in my view, the beginning of a crisis in the operation of our basic system of government.

"We must learn to accustom ourselves to a new world, a world in which actions taken by others can have rapid and serious effects on our economy and on our standards of living, a world in which others have the military means to destroy our nation whenever they are prepared to accept the consequences.- *I very much doubt that in such a world we can long continue to afford the luxury of the division of power and responsibility between our Executive and Legislative branches of government. . .*" (italics added)[1]

Mr. Dillon has formidable credentials. He was Undersecretary of State for Economic Affairs in the Eisenhower administration. John F. Kennedy appointed him Secretary of the Treasury. He was a member of the famous "ExCom" in the Cuban missile crisis.

If the separation of powers is questioned it is logical to assume that the questioner has an alternative in mind. One alternative is the parliamentary system in which the executive is lodged in a committee representing the majority in the legislature. The United Kingdom provides the most common, but not the only, model. In invoking the parliamentary system I am painfully conscious of the risk of "going abroad" to find solutions for problems that have risen at home. Louis Fisher has urged that the Framers of the 1787 Constitution heavily grounded their arguments "on what had been learned at home" rather than on the theoretical writings of Montesquieu or any other writer.[3] What I shall say about flaws in the American system will be largely based on what has been learned at home. But if the flaws are the outgrowth of the institutional arrangements which the Framers devised, then it is logical to look elsewhere for different arrangements. Indeed, even the perception of flaws in the working of institutional arrangements may require some comparison with other arrangements that seem to work better.

The grievous difficulties of adopting parliamentary government in the United States remain. There are profound risks and uncertainties. We have a continental system, plus Hawaii. It is markedly heterogeneous. It has a strikingly different political culture from Britain, West Germany or Japan (but so do they all from each other, yet the parliamentary system works in each). Its pluralistic emphasis on group development has produced a flowering of interests each bent on achieving all it can, regardless of the consequences. And all these distinctive features have long histories.

But we cannot stop there. The dangers that threaten our system are real. The politicization of every interest and issue. Unremitting campaigns and elections that settle very little. Groupistic politics continually verging on anarchy, and virtually achieving it in variuos localities. Public opinion becoming more confused and disgruntled. The recent experience with inflation that nearly surged out of control. In one form or another we may have drastic political change forced on us.

What, then, are the flaws in the American system that the parliamentary system appears able to cure or to ameliorate?

Replacing a Politically Disabled President

The first and primary weakness of the American system is its inability to replace a President who has become politically (not necessarily physically or mentally) disabled. This is a weakness apparent in one American institution that has been widely and rightly regarded as having great virtues, the American presidency. Clinton Rossiter's injunction, "Leave your presidency alone!" still rings in our ears. But with all respect to his memory, we cannot safely do that. I shall give only one example.

In 1940 it was probably crucial to Britain and it may have been equally so to the survival of the United States and to western constitutional democracy generally that Neville Chamberlain be replaced. This could not have happened in the United States. Hitler's panzers and stukas would not have waited while the impeachment process, assuming that it was relevant to the situation, rumbled into play. As Chamberlain's successor, Winston Churchill, expressed it:

"The loyalties which center on number one are enormous. If he trips he must be sustained. If he makes mistakes they must be covered. If he sleeps he must not be wantonly disturbed. If he is no good he must be pole-axed."[4]

The inability quickly to replace the American President is a constitutional flaw of first importance. It is separate and apart from any disability that may have appeared in Britain in the 1970's to maintain cohesive party discipline when confronted by extraordinarily difficult and divisive policy choices. The parliamentary system, even though party discipline falters considerably, would still be able to replace a prime minister who had become politically incompetent. In Britain--but also in West Germany and Japan--it is standard (if, fortunately, infrequent) operating procedure. It is accepted by all parties in government, by "the constituent group," and by the public. In order to operate effectively it must have well-organized, responsible political parties--in the legislature, where the action takes place. In 1940 Neville Chamberlain said, "I call upon my friends."

This draft omits a discussion of Leon Epstein, "What Happened to the British Party Model?" 74 APSR (1980)

Most of them responded. But 41 Conservatives crossed the House to vote against him, and a considerable number abstained. His long-time friend, L.S. Amery, spoke the words to him that Cromwell had used against the Long Parliament: "You have sat too long here for any good you are doing. Depart, I say and let us have done with you. In the name of God, go!"[5] Perhaps even more important, the Labor party decided to oppose. Just as an opposition party's natural function is to oppose in peace time so in war its natural place is in alliance with the Government.[6] Hence Labor's move into opposition showed that Chamberlain was now insupportable.

Just as it is necessary for a great power to have a strong leader, so is it necessary to have a known and settled way of getting rid of him in an extremity. But there are also times when a leader who is performing suitably generally may be prone to imperial mischief which calls not for removal but for chastening.

Government by Presidential Whim or Instinct

This second flaw in our Constitution also inheres in the presidency and produces government by presidential whim, idiosyncrasy or instinct. An excellent example, I think, was President Franklin Roosevelt's scheme to enlarge (pack) the Supreme Court in 1937. That possibility was first suggested to me in 1943 by Chester C. Davis, then President of the Federal Reserve Bank of St. Louis. Mr. Davis had just returned from Washington where he had served briefly as the first War Food Administrator. He had resigned or been fired or maybe it was a little of both. Still smarting, he suggested that my current project, federal-state relations, while important, paled in comparison to problems involving the accountability of the President. His most compelling illustration was the meeting wherein FDR disclosed his plan for the Supreme Court. As head of the Agricultural Adjustment Administration Mr. Davis was included. At one point President Roosevelt went around the table, calling for support. "Chester, you clear this with the farmers." Davis told the President that farmers would be very disturbed at any effort to change the Supreme Court. "And then FDR's eyes got glassy the way they always did when anyone disagreed with him."

That incident stuck in my mind where it was reinforced by others until I became convinced that it represented a serious problem. I was happy to find George E. Reedy discussing it under the heading, "The American Monarchy."[7] It is a characteristic of chief executives generally, but it is brought to its most significant and potentially dangerous pitch (within constitutional democracies) in the President of the United States.

At the same time one must quickly reassert that the virtues of the single President remain, as Hamilton laid them out in Federalist No. 70. Energy is essential in the Executive. To have energy, the Executive must be lodged in one person who must have a sufficient duration in office, and assurance of adequate support, and sufficient powers. Unity in the President Hamilton considered axiomatic. "Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man. . ."

But if these are the virtues of a single presidency, each contains its peculiar dangers. Every President whom I have studied seems to provide examples of the undue exercise of presidential whim or mindsets.[8] Examples appear, I should argue, in the terms of every incumbent since Franklin D. Roosevelt with his policies toward China and his idiosyncratic economics. Examples are most dramatic and disturbing in foreign and military policy, as the Pentagon Papers show, especially when supplemented by the Cambodian invasion of 1971 and the various military initiatives of President Nixon in 1972. Many significant examples occur in domestic policy, such as President Truman's support of an inflationary monetary policy in 1950-1951, President Eisenhower's persistence in a restrictive fiscal policy in 1959-1960, and Lyndon B. Johnson's rejection of a surtax to finance Vietnam expenditures in 1966-1967.[9] President Ford's precipitous pardon of Mr. Nixon and his action in the Mayaguez incident may be illustrative. So may President Carter's admission of the Shah of Iran to the United States in 1979 as well as his effort to rescue the American hostages in Tehran in 1980. Western European allies were wracked by the fear of President Carter's unchecked and impulsive actions in the Spring of 1980 (or, paradoxically, wracked alternatively by the fear of his impulse and the dread of his impotence).

What to do about government by presidential whim? James David Barber's analysis of presidential character may be relevant. He finds that persons with a certain character type that he calls "active-negative" are prone to commit themselves to disastrous courses of action.[10] Following his analysis, such persons should be diagnosed and eliminated during the process of selecting Presidents (but how?); alternatively, the associates of Presidents can counsel them against actions for which they show a dangerous proclivity.

But it is precisely this kind of chastening counsel that the close associates of the President are inherently incapable of providing. I find George E. Reedy more persuasive that the office of the President in a sense demoralizes its occupants, whatever their character types. No one talks to the President "like a Dutch uncle." Rather, there is an "environment of deference, approaching sycophancy. . ." [11]

The parliamentary system provides a specific antidote for the disease of government by presidential instinct or impulse. It offers a check to the expanding ego of the chief executive (prime minister) by requiring that he must face his counterpart, the leader of the Opposition, in debate. I quote Samuel H. Beer on the British "question period":

"It has been reported that a British Prime Minister, after referring sourly to the lofty unapproachability of President de Gaulle and of the effect on him of the deference of his 'court', added that if the President of France had to come down to the House twice a week and stand up to a running fire of questions, this deferential attitude surely would be attenuated."[12]

Here we are again at the heart of the parliamentary system. It works not by separating the executive and the legislative but by bringing them together. W. Ivor Jennings wrote, "To find out whether a people is free it is necessary only to ask if there is an Opposition and, if there is, to ask where it is."[13] If the loser in the race for the presidency were given a seat in the House of Representatives along with certain powers and accessories, a constitutional convention should develop that the President was regularly expected to defend himself and his government in that forum. This should also counter another defect in our present constitutional system, the tendency to endow the President with undue eminence as the re-creation of the "sovereign people."

The President: Legitimized but not Deified

It has long been noted that the President tends to embody the American people.[14] Even before his election, George Washington was capable of personifying the "awful majesty of the American people" to an extent that unmanned at least one of his associates. Such a living symbol of national unity may have been essential to the young nation, but its continuation after 200 years may become a threat because it deepens and strengthens the delusion of grandeur. Yet it has recently become almost a stereotype. "I and the American people have decided. . ." "I and the American people can no longer tolerate. . ." Unfortunately, the saving element of the ludicrous in such hyperboles diminishes to nothing as one approaches the throne.

But if the President is there because he is the leader of a winning party; if he has been nominated by party leaders, some of whom surround him and support him but who, in a grave emergency, might remove him and replace him with another; and if he must repeatedly face in debate the opponent he defeated in the last election but whose legitimacy rests on a pyramid of votes only a little less imposing than his own, then the presidency would be changed. The President would no longer embody the awful majesty of the American people. Rather he would speak for the nation as the leader of the victorious majority party. Certainly his credentials should be sufficiently impressive. But legitimation does not require deification.

Calendar Elections: Self-Inflicted Wounds

Still other weaknesses appear in calendar elections that compound a number of ills. First, in war they present enemies the tremendous advantage of acting when we are most vulnerable. Fortunately we have had presidential elections only twice during major wars since 1812, in 1864 and 1944. This point seems obvious. In Britain the Parliamentary Act of 1911 required elections every five years (reduced from seven). It was immediately breached during the first World War so that the first general election held in Britain after 1911 was in December 1918. Because of the second World War no general election was held between 1935 and 1945 (by-elections were held in both wars). A corollary holds when the country is not actually at war but (as now continually) is under grave threat. Presidential (and even off-year Congressional) elections provide potential enemies with opportunities to harass the United States during peculiarly vulnerable periods.

A second unfortunate consequence of calendar elections is the endless protraction of campaigns. There is no need to devote an entire year (or more) to the nomination and election of a President or of other political office holders. British law stipulates that when Parliament is dissolved, an election must be postponed three weeks (to prevent the Government's exploiting a sudden upsurge of public support by calling a snap election) and held within six weeks. Under calendar elections, by contrast, the "outs" are prompted to enter the field early; the "ins" cannot let them have this advantage; so the competitive stimulus to extend campaigns is irresistible. Moreover, calendar elections lend themselves to elaborate nominating procedures. Among political scientists there probably is no more unanimous agreement than that primary elections are unfortunate and that it would be preferable to charge party leaders with the task of nominating candidates--and at the same time to make them accept the responsibility for the quality of the nominees.

Nearly all knowledgeable people now want American political parties strengthened. To do so requires that control over nominations be restored to political parties. Primaries that all too often have proved a travesty on democracy should be ended. We should heed the counsel of the late E.E. Schattschneider, "Democracy exists between, not within, the parties." Party cohesiveness in legislatures would increase. They could then more easily concert policies. Responsible government (as Epstein defines it) would be enhanced.

Other advantages should also stem from ending calendar elections. The effect of money in campaigns would decline. One simply cannot spend as much in five weeks as he can in a year. Laws restricting campaign contributions by groups, corporations, associations, and individuals and constraining expenditures by parties, politicians, and others will be more enforceable and effective. The ability of organized groups to influence primary nominations and elections (I refer especially to the political action committees or PACs) will decline because it will be much harder to keep such organizations intact during long periods in the thought that an election might be called. Moreover, the PACs would have less incentive to form because, with the disappearance of primary elections, they would lose much of their organized leverage to enforce commitments from candidates forced to enter sparsely patronized primaries.

As the role of money in campaigns would decline so would the incumbent President's use of spoils to insure his renomination in presidential primaries. These would disappear. There would be no time for them. In 1980 Mr. Carter's use of spoils, exacerbated by the rise in state primaries from 16 in 1968 to 37, was notorious. Some commentators congratulated him on his skill in the "great game of politics." But, in Neustadt's classic analysis of the President as educator, what kind of "lesson" did he "teach" the public already profoundly disillusioned with government and politicians?[15]

Finally, there is the role of television in pumping up the "image" of candidates. The art of the demagogue is ancient as the origin of the term implies. But the consensus is strong that television has added its own inimitable perversions. The dangerous over-development of "image" politics is one theme of James David Barber, The Pulse of Politics: Electing Presidents in the Media Age. "Leader-mass politics is inherently unstable; given our Constitutional arrangements it is governmentally unworkable. There are grave risks in proceeding as at present." Reviewing Barber, Walter Dean Burnham says, "Just so. . .Barber's whole book leads to the core proposition quoted above. . . If Barber is serious about this, he must also conclude that these constitutional arrangements must be sweepingly--and soon--changed."[16] Thus two well-known political scientists have recently proclaimed the need for fundamental constitutional reform. Their aims should be realized by the adaptation of parliamentary government.

The American Separation of Powers: Preliminary Summary

If the foregoing argument is persuasive, the reader will see that the fundamental flaw in the Constitution lies in the particular form that the separation of powers takes. To correct the flaws (or, at least, to mitigate their ill effects) one is prompted to turn to some version of the parliamentary system. If a President who fails in a dire emergency is to be replaced, it can be done by party leaders who, if they are responsible, must occupy central positions in a government which, if it is to be in some essential way a "government of laws," must be the law-making body. Hence the Executive and Legislative powers would be joined, not separated. If a generally successful President still requires chastening, it can be done by subjecting him to debate with the one adversary who, in terms of his own electoral base, is the President's peer, namely, the major-party loser in the previous presidential campaign who would assume the leadership of the minority party in Congress. In the same way, providing the losing presidential candidate with a seat in the House of Representatives would encourage the development of an organized, centralized and focused Opposition that would logically evolve to create an alternative government. The new separation of powers would replace the struggle of Executive versus Legislature with a struggle of Government versus Opposition. Happily this may also remove the Olympian halo from the President as the embodiment of the people (whose voice is the voice of God) while leaving him with a sufficiently legitimizing cachet as leader of the governing majority.

The same is true if we are to escape the straight-jacket of calendar elections. The alternative is election on dissolution. Dissolution is obtained by the leader of the government either after a loss of a vote of confidence in the legislature or, with a legislative majority behind him, because he feels that the time is ripe--or the need is great--for a renewal of his mandate to govern by the electorate. In any event, the legislature is intimately and unavoidably involved in the decision.

The Destructiveness of the Executive-Legislative Struggle

This by no means ends the bill of particulars against the separation of powers, American style. Presidential-Congressional relations verge on an impasse. The Constitution divides and allocates power to create what has felicitously been described as "separated institutions sharing powers." The theory was elegantly stated by James Madison in *Federalist* No. 47. But the theory often obscures the fact of a struggle in which one side wins too much the victory. Consider the Japanese and Chinese Exclusion Act of 1924 and the Smoot-Hawley Tariff of 1930. The first, A.N. Holcombe believed, helped put the Japanese on a road that led directly to Pearl Harbor. The second contributed to the world-wide depression that opened the path for Adolph Hitler. It is not simply that these were bad laws made by Congress. Presidents also make grave mistakes. But these congressional laws were classical expressions of the genius of Congress to act for domestic reasons without regard for the effects on foreign policy.

In a somewhat different way, this time in response to a public mood of revulsion following the Nye Committee Hearings on the "Merchants of Death," Congress passed the Neutrality Act of 1935; a "never again" club flourished in the 1930's just as one did in the early 1970's when the War Powers Act was written in 1974. The Neutrality Acts, revised and extended, did not inhibit Mussolini's conquest of Ethiopia nor Franco's victory in Spain (with the effective assistance of Mussolini and Hitler). In 1939 President Roosevelt tried to get Congress to repeal the Act. Senator Borah, among others, checkmated him. In 1940 Congress did pass the first peacetime conscription act but only for one year; in the summer of 1941 it was re-enacted, and it carried by one vote. Such were the signals imparted to Hitler's Germany.

In the 1970's, among other actions, Congress passed the Jackson Amendment that tied the Soviet-American Trade Agreements in 1974 to the freedom of Jews and others to emigrate from the USSR even though Secretary Kissinger argued that the end could be achieved better by quiet diplomacy. The upshot was that the USSR called off the Trade Agreement in January, 1975. Congress banned arms sales to Turkey pending a Cyprus settlement. In consequence Turkey closed down more than 20 common defense areas which the U.S. had used to monitor Russian material shipped to the Middle East as well as the overflight of Soviet planes and Soviet troop movements, e.g., the troop movement in October 1973 that brought about a crisis with the U.S. in the Yom Kippur War. In the Trade Reform Act of 1975 Congress denied most-favored-nation preference to members of OPEC in retaliation for the oil embargo; the Act applied to Venezuela and Ecuador although they had not joined in the embargo. Years later the incident still rankled in Latin America. In 1980 Congressman Zablocki, Chairman, House Foreign Relations Committee, noted that Congress had passed 70 limiting amendments on presidential conduct of foreign policy. Congressman Satterfield said that any President who tests the War Powers Act may find that he is no longer Commander-in-Chief, pending the resolution of the question by the courts.

Probably more important by far was the presidential withdrawal of the Salt II treaty from consideration by the Senate in 1979. The treaty had been under negotiation for 8 years by three American administrations. Craig R. Whitney, the New York Times bureau chief in Moscow, called Salt II the "centerpiece of detente" that Brezhnev and Carter signed in Vienna in June, 1979. Prospects seemed improving. Then the treaty went to the Senate. Reports multiplied that it could not be approved. As TRB reported, out of a Congress with 535 members 34 Senators can kill a treaty. "The Senate just delayed action. And the roof fell in." Professor Epstein argues that when the margin of victory of British Governments falls to 40 percent their mandate to govern is compromised. But the American Constitution vests the ability to veto a treaty in a handful of Senators who may have been elected by 10-15 percent of those eligible to vote in the United States. And we still call it Russian roulette!

Thus one may explain the growing willingness to ask whether the United States can still afford its classic version of the separation of powers now that her isolation--and insulation--has ended. Rising comprehension of the implications of the nuclear age have been compounded by the growing dependence of the industrialized world on Arabian oil, so far from the power of the United States, so close to the Soviet Union, so wracked with the strangeness, the suspicion, the financial dominance and the military weakness of Islam. Mixed with all this is the tension between Israel and the Arab states as well as the fluctuating animosity between the United States and Russia--paranoid (perhaps?) Russia with its new fear of revolutionary Islam to the South, its consciousness of an inimical People's Republic of China to the East, and its memories of devastating invasions from the West.

We need a foreign policy, a military policy, and an energy policy that have some coherent relationship one to another and that recognize the mutual interrelationship between and among energy, military preparedness, the economic viability of the industrial West, and continued co-existence with Russia in a situation in which neither Russia nor the United States becomes so clearly dominant in the view of the other that the ultimate war becomes a real alternative. We can hardly hope to achieve the unity that Hamilton urged in Federalist No. 70 when our chief adversary has no surer knowledge of where power resides in the United States than the United States has in 1980 of where it lies in Iran.[17]

A parliamentary system with a government resting on a clear majority would not guarantee the survival of America in this incredibly dangerous period, but it would improve our chances of achieving the necessary cohesion in policy.[18] It would also provide an institutional basis for a "government of national union" if the tension mounts to the point where one is clearly needed. But the vested interests in the institutional status quo will make the transition exceedingly difficult.

The "Special Interest State"[19]

Pluralism, long the pride of America, has become a problem. The flowering of interests has intertwined with the rise of the managed economy, of promotional and regulatory government, and of the welfare state to produce a huge governmental apparatus. The growth has been influenced by the nature of our institutions, shaped as these are to encourage decentralization and the proliferation of concentrations of semi-autonomous power. Generalizing broadly, the experience in Congress is indicative. The Progressive reforms of 1911 devolved power from the Speaker into the hands of Committees; The LaFollette-Monroney reforms of 1946 helped spread power further into the hands of subcommittees. In the 1970's the movement continued with power now disseminated into the hands of individuals members each with his lavish funds for staff so that he could, in effect, become an operator of a piece of the government.

In this way the triumph of "interest group liberalism" that Theodore W. Lowi deplored in 1969 has been accelerated.[20] The Bentleyian idea and ideal of "no interest without its group"[21] has progressed into "no conceivable interest without its groups, its legislators, its laws, its agencies, and its budgetary entitlements." In consequence, "iron-triangles" or what, following Richard Neustadt, I prefer to call simply "bureaucracies," have multiplied.[22] The result is a splintering of government which may find its rationale in ancient American political and religious beliefs as Don K. Price has described under the suggestive title, "Irresponsibility as an Article of Faith." [23]

It is also argued by Lester Thurow that the result of the special interest state is inflation. His proposed solution, rare for an economist, is through strengthened political parties which would be able to resist the importunities of interest groups sufficiently to maintain a fiscal and monetary policy which would control inflation.[24]

As I have said repeatedly, a move toward a parliamentary system would (if we were lucky) help strengthen, centralize and make more responsible our major political parties. Moreover, it could conceivably make for an improvement in public opinion.

"The Changeability of Public Moods"

Twenty years ago Richard E. Neustadt listed the emergent characteristics of the new politics, including, along with ticket-splitting and the weakening of political parties, the close approach of world events, and the changeability of public moods. This is a theme that Walter Lippmann elaborated in his classic Public Opinion in 1922 and, again, in The Public Philosophy in 1954. Patrick Caddell rediscovered the phenomenon and reported it to President Carter who dwelt on it--uncharacteristically for a man given to the most extravagant praise of "the American people"--in a speech lamenting the "malaise" of the public in 1979.

One way of attacking the malaise of the public (or its "travail" as I wrote in 1974) is to embrace a theory of a sensible division of labor that would separate the act of creating Governments (and Oppositions) from the act of governing and then apply the theory in a proper system of government. As it is we mistakenly endow "the people" with the sovereign capability of deciding all issues in their most minute detail; we overload them with a multiplication of elections and a proliferation of primaries to make sure that they not only elect but that they nominate as well; and on top of that we provide for "direct" government at the state and local level in which citizens are empowered to write laws and state constitutional provisions, to require that existing laws and constitutional provisions be referred to the public for reaffirmation or reversal, and, occasionally, to review the question whether existing elected officers should continue to serve their terms. The result, or at least, the concommitant occurrence has been a growing apathy not to say a demoralization of the people as citizens.

How much better it would be to simplify the citizen's formal task by limiting it to the one act which he, and, in a democracy, only he can properly perform: the act of creating a Government (and an Opposition) by his vote.

Conclusion

The issue of the adequacy of American political institutions has been raised. The very fundamentals of the separation of powers between President and Congress have been questioned. I have asserted that a cure may be found if we embrace a different separation of powers, one between the Government and the Opposition, and that we may do so by adapting to American practices and conditions the principles of the parliamentary system.

In the past the most charitable reception for such arguments was to consider them quixotic. They may not be so lightly dismissed now. At the same time, if they should begin to be taken seriously, they may appear as threats. Paul Craig

Roberts reported on May 15, 1980, on a conference under the auspices of Georgetown University's Center for Strategic and International Studies held in Williamsburg, Virginia. The congressional leaders and public men who gathered reached a consensus (at least, as implied by Roberts) that held "a nation that relies on a self-critical posture as its means of pursuing progress is forced to de-emphasize its achievements. When the piecemeal indictments of the economists, political scientists, sociologists, historians, theologians, and ecologists are added together, the result is a total indictment of America. The U.S. simply appears too dissatisfied with itself to pose as a model for others."[25]

Respecting many criticisms of the United States, I share Mr. Robert's view. But with regard to the working of our fundamental political institutions, it is time for re-examination. Fortunately the 55 men who gathered in Philadelphia in 1787 thought the same.

FOOTNOTES

1. Quoted in James Reston, "Where Are We Going?" The New York Times, December 23, 1979.

2. "What Happened to the British Party Model?" 74 American Political Science Review (1) p. 20 (1980).

3. Congress and President (New York: The Free Press, 1972), p. 4.

4. The Second World War, vol. 2, Their Finest Hour (Boston: Houghton, Mifflin, 1949). p. 15.

5. Quoted in R.T. McKenzie, British Political Parties (New York: St. Martin's Press, 1955), p. 47.

6. W. Ivor Jennings, The British Constitution (Cambridge, England: The University Press, 1942), p. 192.

7. The Twilight of the Presidency (New York: World, 1970), Ch. 1.

8. Charles M. Hardin, Presidential Power and Accountability: Toward a New Constitution (Chicago: The University of Chicago Press, 1974), Ch. 3.

9. ______, "The President and Constitutional Reform," in Thomas E. Cronin and Rexford G. Tugwell, Editors, The Presidency Reappraised, New York: Praeger, Second Ed., 1977), p. 286.

10. "Analyzing Presidents. . ." Washington Monthly, November 1969; cf. The Presidential Character (Englewood Cliffs, N.J.: Prentice Hall, 1972).

11. Op. cit., first two chapters.

12. "The British Political System," in Beer et al., Patterns of Government (New York: Random House, 1973), p. 211.

13. Ibid., p. 78.

14. The President: Office and Powers (New York: New York University Press, Fourth Edition, 1957), p. 30.

15. Presidential Power (New York: Wiley, 1959), Ch. 5.

16. The New Republic, March 24, 1980.

17. Stanley Hoffmann reported that Europeans (not only Russians) had "been watching the American political scene with increasing bewildernment. The cascade of interrupted or failed presidencies, the rivalries within the foreign policy making process in the executive branch, the revolt and frequently destructive interventions of Congress, the dismal spectacle of the presidential campaigns, the apparent mediocrity of presidential personnel, the broad swings of public opinion, have been

deplored, but neither perceptively analyzed nor understood," "The Crisis in the West," The New York Review of Books, July 17, 1980, p. 41.

18. How bad is the need was recently suggested by Robert E. Osgood who, after listing "notable Western weaknesses," concluded: "and, most markedly in the United States, the fragmentation of political power and the policymaking process as the cold war consensus ceases to provide the integrating framework of a coherent foreign policy under presidential authority." Limited War Revisited (Boulder, Colorado: Westview, 1979), pp. 95-96.

19. Elizabeth Drew, "A Reporter at Large: Phase: Engagement with the Special Interest State," The New Yorker, February 27, 1978.

20. The End of Liberalism (New York: Norton, 1969, 1979).

21. A.F. Bentley, The Process of Government (Chicago: University of Chicago Press, 1908), p. 211, passim.

22. Cf. Hardin, footnote 8, Chapters 4-6.

23. Published in Harlan Cleveland and Harold D. Lasswell, Eds., Ethics and Bigness (New York: Harper and Brothers, 1962).

24. The Zero-Sum Society: Distribution and the Possibilities for Economic Change (New York: Basic Books, 1980).

25. The Wall Street Journal.

Mr. FULBRIGHT. It's a statement of basic principles with which I am in agreement. I think there is no use in cluttering the record. I think it should be a centerpiece for these hearings.

This question is going to be treated, I noticed, by some of your witnesses, very distinguished scholars, in a way that I didn't think was appropriate for me.

As a long-time Member, some 35-year Member of the Congress, I believe that our present system has resulted in an electoral process, especially for the Presidency but also for the Congress, which I think is no longer tolerable. The electoral process for the Presidency has became a scandal.

I would like to submit, if it's agreeable to you, one or two articles by some distinguished journalists commenting upon the last Presidential election. This has nothing to do with the individual. It is the procedures. And if that's all right—I think they are relevant to this subject of the way our electoral process has degenerated into a kind of a circus, which brings contempt and, I think, ridicule on our whole system in the eyes of certain foreign countries as well as our own citizens.

If we think of ourselves as an example of a great democratic country—which we have been, in my opinion, for 200 years—I think we should be very concerned about it from here on.

I think as long as we were performing on the domestic scene and providing the good life for our citizens with great success, now that we have become the center of international interest and we have allowed these procedures to degenerate into a kind of circus, I think it's very serious as to whether or not we are an appropriate example of a democratic country.

In any case, I'd like to submit to the record from the Wall Street Journal an article entitled "A Presidential Puzzle," in which a Mr. Royster certainly makes a point the procedure has become a kind of a circus, and he wonders why anybody would want to be President under these circumstances. I think it's relevant to this question that we should have a different way of selecting our Chief Executive.

Another article, I hope these are not repetitious, by Henry Brandon. It's a very thoughtful article entitled "The U.S. Constitution: Is It Time for Reform?"

And I believe one or two others, one in particular that I would read to you, I won't read it all, it's too long. This is after the conventions in the last presidential election:

> That was how it ended—in tears. There were few Americans who did not have some reason to cry over the process that began August 2, 1978, when Representative Philip Crane announced his candidacy for the Republican Presidential nomination, and ended just over 2 years later with Jimmy Carter and Edward Kennedy avoiding each other's eyes on the podium at Madison Square Garden. The new American process for selecting the President is a national embarrassment.

I think that's quite true. I've been to three conventions myself, and I have felt very much the same way. I was embarrassed by the atmosphere and the casually superficial atmosphere that prevailed in those cases. That's one of my first practical objections to our present system. The other was of a little different nature.

[The articles referred to for the record follow:]

[From the Wall Street Journal]

A PRESIDENTIAL PUZZLE

(By Vermont Royster)

All spring and into the summer an idle question has been running through my mind, one that I doubt will be answered by next January, if ever.

Namely, why does a sane man in the year 1980 want to be President of the United States?

True, the office pays well enough. President Carter gets $200,000 a year salary plus $50,000 which he can account for as expenses or, should he prefer and find it feasible, take as additional income, although in that case it becomes taxable. He's also allowed another $100,000 for official entertaining, non-taxable.

For travel he has at his disposal luxuriously outfitted jet airplanes with worldwide capability, maintained and crewed by the Air Force, as well as helicopters and limousines for shorter jaunts.

Our Presidents also get to live in a nice house, roomy and staffed from chef to upstairs maid at public expense. For weekends there's Camp David, which is as comfortable and pleasant a resort place as you'd find anywhere. The mansion and grounds staff numbers 85 and the President has more than 400 aides and assistants for office chores. It really isn't necessary for him to carry his own suitcases.

Altogether then, as they would say down in Sumter County, Georgia, a President of the United States lives pretty high on the hog. Even after he's left the office he doesn't do badly. Richard Nixon and Gerald Ford, neither of whom served the Constitutionally permitted eight years, get lifetime pensions of $60,000, free office space, free mailing privileges and $90,000 a year for office help.

So one answer to the question, I suppose, might be mercenary. Anyway, few modern Presidents—Herbert Hoover, Franklin Roosevelt and John Kennedy would be exceptions—have been as financially well off before they took office as afterwards.

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But that's an answer no hopeful would admit. It's also, I hope, not true. It would be sad to think anyone sought the Presidency for the rewards from the public purse.

There remain the traditional answers—ambition for power, for honor or their respect of one's fellows. Jefferson, Cleveland, Wilson, the Roosevelts, Eisenhower, none of these was devoid of such personal ambitions. Each was also a man of prior accomplishment and pride. That pride included a belief in certain political views they held important for the welfare of their country and the feeling that they—and perhaps they alone—could give them substance to the benefit of their country.

Today these answers are less persuasive. The office itself retains its glamour but of late the incumbents have personally received little honor and not much respect. In office they have been targets not just for the inevitable political criticism but of jokes, jeers and sneers. It took martyrdom to give Kennedy a place of honor. Johnson was so vilified he withdrew. Nixon was drummed out of office. Ford was turned out, the butt of jokes. Carter has lost not gained in respect, at home and abroad, in his first years in office.

Nor is the Presidency any longer a warranty of power. Our political affairs are in such disarray a President can barely lead the country. With Nixon and Ford we had divided government. Carter has a majority party in name only. His party in Congress ignores him. A major leader within it is emboldened to taunt him without fear.

So an aspirant to that office—a Reagan or an Anderson—cannot suppose that the prize once won will raise him in the regard of the citizens or enable him to lead the country on the path he would have it follow. The White House has become a hollow place for a man of ambition, save for the trappings of office.

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But that is not the only puzzle as to why it would be sought by a man of pride in his abilities. Another lies in what he must bear to achieve it.

No one, except maybe Eisenhower, has achieved it without burning ambition and even he once in the lists fought for it. But until lately custom and tradition restrained what old Cicero called "the electioneering and scrambling for office." It's hard to image Franklin Roosevelt in his wheelchair spending six months outside factory gates to beg a vote in an Ohio primary.

He and his friends worked hard indeed to convince his party he was the man to carry the banner. Once nominated he worked hard to put his case before the voters.

He could and he did nonetheless do it with some dignity. And that was one reason why, I suspect, he could keep his dignity in office for all that he drew fire from his political adversaries.

Nowadays it's different. Jimmy Carter became President by barnstorming the country like a traveling salesman, sitting in kitchens pretending to be "just folks." His rivals have followed his cue. Ronald Reagan has been scrambling for the office for four years. John Anderson, a Johnny-come-lately, is still scrambling. Gather a hundred people at a luncheon, a dozen in a living room, and any time this spring you could have had a Presidential hopeful there to smile, shake hands and show himself a nice fellow.

What all that shows of a man's vision, of his ability to cope with the problems of his country, I do not know. At best it is grueling, at worst demeaning.

None of the candidates this year, if I may judge by the polls, impresses as an exceptional man. Not surprising. For those of ability there are other roads to honor and respect. The Presidency diminished and its winning made such an untidy affair, the wonder is, circa 1980, there are any to grub for it.

THE U.S. CONSTITUTION: IS IT TIME FOR REFORM?

(By Henry Brandon)

The political air is full of assertions why U.S. power and credibility has declined. Whether it is in congressional hearings or budget discussions or in presidential election campaign speeches, we are told that this has happened because American military strength has fallen behind the Soviet Union or because American industrial power has not kept pace with the rest of the industrial world or because inflation has weakened the dollar on the world markets—just to mention a few of the most frequently mentioned arguments.

But, at least as seen from abroad, the most outstanding reason why the United States has lost so much credibility with friends, even with enemies, is the outdatedness of the U.S. Constitution.

It is, of course, nothing new that the balance of power between the executive and the legislature makes it difficult to govern this country. But it has perhaps never been felt as acutely as it is today. It may come as a surprise that this constitutional weakness engenders almost more critical attention abroad than the number of missiles the United States can command compared to the Soviet Union. For effective government has become a matter of survival.

The U.S. Constitution is not only the oldest, it is also the least changed in the world. The office held by President Carter is far more like that occupied by George Washington than that held by Queen Elizabeth II is like that held by George III. It is encouraging, therefore, that a growing body of opinion is again questioning the merits of the American political system as against the parliamentary system even though I doubt that, in itself, it offers a practical alternative.

That does not mean, of course, that some aspects of the parliamentary system could not be adopted to improve the operations of the American government. After all, if Franklin and Jefferson believed in a "new order of the ages," in 1776, what would they have said today in our Mutually Assured Destruction (MAD) world?

Americans complain about the lack of presidential leadership, about the ineffectiveness of government and most of all about the Congress. They attribute the failures of government to a variety of reasons, such as personalities, mismanagement, misconceived policies and so on. But they rarely take into consideration one of the most fundamental causes; the outdatedness of the Constitution.

Lloyd N. Cutler, counsel to President Carter, in an article in the current issue of *Foreign Affairs* magazine, makes a convincing case for the need to reform the Constitution. He proposes some improvements that would lead to a more responsible relationship between the president and his own party in Congress—such as permitting the president to select 50 per cent of his cabinet from among members of his party in Congress, while allowing them to retain their seats; or a budget whose overall scope would have to be approved by Congress, but with exact allocations left to the president.

INTERNAL CONTRADICTIONS

When President Kennedy tried hard to get a tax cut out of Congress without success, the then British prime minister asked me with undisguised horror: "You mean if the American president wants a tax cut from Congress he can't get it? It would take me not more than three weeks to get it from Parliament."

Former Sen. J. William Fulbright has also made a cogent case recently in favor of constitutional reforms, arguing that the method of selecting the American president reinforces the belief held around the world that "our society is doomed by its internal contradictions." His basic reform proposal is to select the executive by the legislature from among its own members.

It may even be possible, I believe, to achieve some minor improvements without a constitutional convention, which has never met, although the original idea was for it to convene once in a generation. The President, for instance, could bring the majority leaders of the House and Senate more intimately into the policymaking process.

It would not be easy for a president alone to make constitutional reforms part of his legislative program, because he would have to spend too much time and political capital on such a crusade. It is, however, nettle that a small congressional committee under the leadership of such experienced, respected and able men as Sen. Robert Byrd, Speaker "Tip" O'Neill and a few others, including some Republicans, could grasp.

There is little doubt that it would ensure them a much more secure place in American history than any other cause they may be fighting for.

Reason To Cry Over This Year's Political Carnival

(By Richard Rovere)

New York.—Rose Marie Schmidt, who is 67 years old and has worked in the Democratic Party for 43 years, sat in the middle of the California delegation to her party's delegation to her party's convention Thursday night and cried as the delegates booed their own nominee. "It hurts so," she said. "It's wrong, showing the whole world we have no respect for the president."

That was how it ended—in tears. There were few Americans who did not have some reasons to cry over the process that began on Aug. 2, 1978, when Rep. Philip Crane announced his candidacy for the Republican presidential nomination, and ended just over two years later with Jimmy Carter and Edward Kennedy avoiding each other's eyes on the podium at Madison Square Garden. The new American process for selecting a president is a national embarrassment.

Two years, millions and millions of dollars and incalculable human energy were spent for . . . for what? To renominate a failed president, to nominate an actor who has routinely performed as an extremist, and to allow the press to select its own candidate, a losing politician who couldn't win a single primary election.

Campaigns are meant to test candidates. The 1980 nominating campaign didn't test much beyond patience. Two of the most vulnerable candidates in American political history—Jimmy Carter and Ronald Reagan—were able to glide through the process without answering, usually without even addressing, the serious questions their careers had raised. Carter, for his part, simply didn't allow any questions and may not have known what people, his own people, thought about him until Thursday in Madison Square Garden.

The third candidate, John Anderson, failed within the political system, losing 11 straight Republican primary elections. But he survived as a candidate—and may actually be running second in the general election campaign—because the political system, and the candidates it is producing, are so discredited that a single profession, journalism, could muster enough influence and energy to nominate its own candidate.

Jimmy Carter won renomination, if not the real commitment of his party, because he was clever enough, and cynical enough, to exploit the seizing of American hostages in Iran last November.

From that point on, his campaign was an appeal to patriotism and a successful attempt to explain his own failure by convincing Americans that no president can accomplish much. The politics of incompetence, practiced by a master.

Ronald Reagan, it could be argued, won his nomination in about two seconds. The two seconds it took him to say, one night last February in Nashua, N.H.: "Mr. Breen, I paid for this microphone." That is an oversimplification, of course. Reagan worked for many years to win the devotion of Republican conservatives.

But even that faith had been shaken by his confused, lethargic campaigning—raising questions about his age, energy and intelligence. Then network television began showing, again and again, the film clip of an angry man in a dramatic confrontation.

Television, the technology and the business, is at the core of what has gone wrong with the process of selecting presidents.

The technology of instantaneous and pervasive communication has transformed local events—like the debate the night in New Hampshire—into national events. But the nation, the citizens of the democracy, are only exposed to the new national events. Most Americans have no power in the process. Votes are power, but only people in New Hampshire had votes in that case. Americans in New York or California could only watch helplessly—they were quite literally alienated from the process of nominating presidential candidates.

The conventions, which ended Thursday with Rose Marie Schmidt's tears, were meaningless in terms of the selection of candidates. In effect, the Iowa caucuses and the New Hampshire primary—national television events—were the real first ballots of the conventions. And, as in the past, the leader on the first ballot was almost certainly going to be the nominee. One of the reasons that the early leader is the likely winner is that early losers have difficulty raising money.

That touches the business of television. Networks and local stations, the proprietors of the "public" airwaves, charge for the public's business. The cost of television advertising is what has made American politics so expensive. Once a candidate is behind, he or she has trouble raising television money, and without television money it's damned near impossible to catch a front-running Jimmy Carter or Ronald Reagan.

That's how we ended up with Carter and Reagan—the choice so many Americans seem to find distasteful.

The genuine distastefulness of the two men, the alienation of millions of voters excluded from the nominating process by the new rules and new realities, and the inherent drive of newspaper and television for conflict and confrontation are what created "the Anderson difference."

So, many people who care are left with an extremely difficult choice in an election that may very well be critical to the future of American politics. The conventions in Detroit and New York revealed dramatically that there has been a role reversal in American politics. The Republicans, now, are the party of ideas; they want to change America. The Democrats are intellectually bankrupt; they are the party of the status-quo.

Whether one agrees with it or not, the Republicans' platform call in Detroit for "a bold program of tax rate reductions, spending restraints and regulatory reforms" is an idea or a series of ideas. The Democratic paeans to Roosevelt, Truman and John Kennedy, and the endless, exaggerated attacks on Reagan were substitutes for thought, a way to fill time because the party had nothing to say in New York.

Carter, the Democrats' winner, topped off the barren rhetoric with a couple of examples of how low the Democrats have sunk.

"We've reversed the Republican decline in defense," the president said, totally contradicting his record, his 1976 acceptance speech and his attacks on Reagan as some kind of warmonger. "The Republicans talk about military strength, but they were in office for eight of the last 11 years, and in the face of a growing Soviet threat they steadily cut real defense spending by more than a third."

Statistics lie. And so do presidents who say that Republicans are less defense-oriented than Democrats. The reason defense spending dropped under Republican presidents is because Republicans ended the war in Vietnam.

Then, in summarizing his goals, Carter began: "I want teachers eager to explain what a civilization really is . . ." The 379 delegates and alternates who are members of the National Education Association, the teachers' lobby, stood to cheer—they recognized the code words meaning that they will continue to get whatever they want from this administration in return for the effective support of their disciplined political organization.

But Carter's challenger, Senator Kennedy, was only offering a more stylish version of the same ideas the Democrats have been running on for almost 50 years. They were the ideas of the New Deal—government-enforced base-level economic security. The New Deal has been completed, generally successfully, and images of children starving in the streets don't seem particularly relevant these days.

The United States has dealt with many of those problems, and the Reagans of the world—even if they didn't want to spend money for those kids—understand that fact and America better these days than the Kennedys. Sad, but true.

If Reagan goes on to win this election, there will probably be a new kind of Democratic Party by 1984.

[From the Washington Post]

MOB RULE

(By Dick Dabney)

"Every mob, in its ignorance, blindness and bewilderment, is a League of Frightened Men, that seeks reassurance in collective action." Thus wrote Max Lerner some years back. But what's dismaying about these last two political mobs in Detroit and New York is that no one seemed to be frightened, at a time when the Soviets have four nuclear warheads for every county in the United States; and neither did anyone express bewilderment, although these are the most bewildering times we've yet lived through. But ignorance and blindness still reigned.

Although political conventions are traditionally mindless, those of 1980 had an especially macabre quality, because they were emblematic of a nation that was losing its reason. And the foolish hats, stupid slogans, loud bands and screaming, empty-eyed animalistic faces no longer gave off the impression of delegates who had interrupted sane lives for a week of hysteria and drunkeness, but of those who were mindless all year long, who lived that way, who had never thought consecutively for 10 minutes in their lives, who knew nothing of the difficulties facing this country, and wouldn't know how to respond if they did.

At both conventions, "passionate certitude," to use Yeats' phrase, was dominant. And although the forms this mindlessness took were superficially different—the Republicans heavily into evangelical cults, the Democrats into cult-like single-issue politics—the impression one got of a zombie-like intellectual passivity was essentially the same. So, in terms of stupidity, there wasn't a lot to choose between the Kansas Pentecostalist who thought that God, if correctly manipulated, would fry Russia and give us everything, including good parking spaces, and the urban lesbian thug who seemed to believe that, if the government would only help to murder a few million more unborn children, everything else, including the GNP, would automatically turn out swell. Thus our national political conventions came across as dervish mobs of the Big G—God for Republicans, Government for Democrats—alike in believing that the Great External Solver, moved by the true believers' hysteria, would come down and make everything okay.

"A mob," Thomas Fuller wrote, "has many heads but no brains," and such was the feeling one got from watching scores of interviews with those delegates: an overwhelming impression, not merely of one fanatic, fool, dullard or knave, but of delegate after delegate who showed no knowledge of, nor interest in, the world or national situation, and no inclination whatever to summon up any thought about what was to be done. The group—whether video cult, or union or NEA—always had a position paper on that tucked away somewhere, and as for the rest of it, all the average delegate had come to do was to grunt or shriek the name of one candidate and go home.

Laced in among these were the professional politicians, who did seem to be fairly well versed in the issues. But with most of these, one had the sense that, while they knew where Senator A or Bloc B stood on such questions as the retargeting of nuclear warheads, the decline of U.S. productivity and the collapse of our education system, this was *all* they knew, and that they would have regarded it as a chump's chore to actually take thought about what ought to be done. Politics, for them, seemed mainly a matter, not of thought, but of "positioning" oneself among various competing, screamers. Although there were occasional outstanding exceptions—men like John Glenn and Mac Mathias who'd made a life's work out of trying to come to terms with reality—these were out of it, and would never be up there on the podium as national nominees, because they did not have the time, let alone the inclination, for tickling, feeding and flattering that headless ape, consumer democracy, let alone leaping into its lap and licking its fingers.

Moreover, the media seemed to have the same mentality the delegates did, and lavished their most intense, verbose concern on such questions as whether Ted Kennedy would come to the platform with Jimmy Carter, and what form their hand clasp might take and, later, what the little nuances of expression on the senator's face might mean for the future of Western civilization.

Real thinking, then, for observers and participants alike, was no longer something you did for yourself, but a menial task you hired others to do for you. And under the circumstances, it was no wonder that the apotheosis of each convention came when a millionaire read a speech that had been written for him, from a teleprompter that worked perfectly, to rapt followers who hadn't the slightest notion as to what was being said. And so it was that our political conventions came across as festivals of unreason—"Star Wars" worlds peopled mostly by animals, children, androids and machines. But it was less fun than "Star Wars," because it was real.

These mob scenes did not come to us causeless. We live in a civilization under stress, wherein the threat of annihilation and the disordering impacts of radical change and opportunist leadership have made us feel helpless. This stress has caused many of us to revert to a childishness that runs deeper than the wearing of silly hats—a true-believing passivity that looks for magic, or for daddy, to come to the rescue, and that stubbornly refuses to think about what's out there. This is understandable. But it is the mentality of a mob, not of a free nation. And what we really have in common, what really unifies us, is neither our righteousness nor our incessant demands but the need to take control of our imperiled lives, whether the Force is with us or not.

Mr. FULBRIGHT. I think the change to the system in which the legislative and executive merged and the executive comes out of and from the legislature, which is commonly called the parliamentary system—there are many variations of that, many different countries have it and they have slightly different characteristics.

But I think one of the principal virtues of it—none of them are perfect, there's no panacea—but it is that it gives a real incentive to members, to people—ambitious, intelligent people to be members—because it is a route to becoming influential and having influence and power within the community; whereas our system is a kind of dead—and I don't wish to be personal about it, but a lot of our leading Members of this body I have seen, in my experience, leave either this body or the Senate because there was no end—they had no opportunity to become members of a cabinet or have greater influence in our political life. And they would choose to go into private industry, private endeavors, where they felt they could have a greater opportunity for their talents.

This, I think, is a great reflection upon the system.

I remember, when I was new in the House, two of the leading Members there—one of them was Bob Ramspeck, I remember, and the other was Cliff Woodrum from Virginia, a very distinguished Member—both of them left voluntarily because they sought and had received very prominent places in private industry. I think it's a great reflection on the system which can't attract the best people in the community.

I realize there are lots of people in this country who don't want our Government to be better, they like it like it is, because through these PAC's and certain organizations they can get what they like and they run it. They are the major influence in our Government. Without any reflection on this body, we know that that's true. We look at this last election, the influence of the money in the last election. There was an article in the morning paper indicating how significant that is.

The public interest gets lost in the rivalry between these private interests. I think while you will never eliminate them, and a parliamentary system doesn't eliminate it, I think it minimizes it. First, you don't have national elections. Your constituency is only roughly, if you divide it into 535 now, by our population—in the neighborhood of 500,000—that's not an unmanageable size. It's not beyond the capacity for a candidate to be personally acquainted with many of the constituents. They don't have to rely solely on quickies on televison.

Last, I might say television has become a terrible burden to our system. It's exacerbated and exaggerated in these national elections. I don't know how you get rid of it or how you restrain it. I have no answer to that.

I tried when I was in the Senate—made some suggestions. The people who like it as it is are too powerful. I couldn't get anywhere with it. So, I don't know if there's anything that could be done about that.

But I do think those abuses would be minimized—ameliorated to a degree with elections at the district level, which would roughly be 500,000.

I realize problems about adjusting the Senate and the House, and those are details. But they can be worked out if the basic principle is adopted.

So, I would end by simply saying I believe that we should give serious consideration to a merger of power between the executive and legislature, that they be merged under what we normally call a parliamentary system.

Thank you very much.

Representative Reuss. Thank you, Senator Fulbright. Mr. Schlesinger.

STATEMENT OF ARTHUR SCHLESINGER JR., ALBERT SCHWEITZER PROFESSOR OF THE HUMANITIES, CITY UNIVERSITY OF NEW YORK

Mr. Schlesinger. I have a statement which I will not read in full but which, I trust, will be entered into the record.

I too would like to begin on a personal note, with an expression of high regard for the eminent chairman of this committee and of deep regret for his decision to retire from this body which he has served with such distinction for more than a quarter of a century.

I have no doubt, however, that there is life after Congress and that Henry Reuss' voice will continue to sound forth cogently on the issues of the day.

SEPARATION OF POWERS NEED NOT DISABLE GOVERNMENT

The question, I take it, that we are examining is this: Is the difficulty we encounter in devising effective remedy for the problems that assail us the consequence of defects in our leadership or of defects in the structure of our Government?

Given the separation of powers, the erosion of party responsibility, the influence of single interest groups and lobbies, is our political system capable any longer of making the decisions necessary to bring our problems under control?

Has not the time come to demand basic constitutional change that by checking or abolishing the separation of powers will restore the capacity of Government to act with decision and dispatch?

Such questions imply that we have only fallen latterly from a golden age in which the process of governmental decision was relatively efficient, political parties were disciplined and responsible, and single interest groups and lobbies were trivial or nonexistent.

But was there ever such a golden age? The historian is bound to observe there is nothing especially new about the conditions that are supposed to have brought our system into its alleged present state of paralysis and crisis.

After all, we have had the separation of powers from beginning of the Republic. If parties arose in part as a means of overcoming the separation of powers and providing the link between executive and legislative, they have always done so in a haphazard way.

We have never had the disciplined party operation required by the parliamentary system. The reasons for this were clear from the start. Tocqueville pointed them out a century and a half ago. Our legislators, as Tocqueville wrote in 1840, must always "think more of their constituents than of their party—but what ought to be said to gratify constituents is not always what ought to be said in order to serve the party to which representatives profess to belong—hence it is that in democratic countries parties are so impatient of control and are never manageable except in moments of great public danger."

Party indiscipline is hardly a latter-day novelty. A loose party system has been necessary to accommodate diverse interests and regions in a far-flung Federal Republic. Nor can anyone who has read the 10th federalist or recalls the Anti-Masons, the abolitionists, the know-nothings, the prohibitionists, the greenbackers, and so on suppose that "factions" as Madison called them—single-issue groups—are an invention of the late 20th century.

Nor can anyone who has read Mark Twain's "The Gilded Age" or meditated the gaudy 19th century career of Sam Ward, the "King of the Lobby," take powerful lobbyists as an appalling innovation of our own times.

The constitutional reformers, in short, are protesting what have been in fact the routine conditions of American politics. Yet these conditions—the separation of powers and all the rest—have not prevented competent Presidents from acting with decision and dispatch throughout American history.

The separation of powers did not notably disable Jefferson, Jackson, Lincoln, Wilson, or the Roosevelts. Why are things presumed to be so much worse today?

It cannot be that we face tougher problems than our forefathers: tougher problems than slavery; the Civil War; the Great Depression; the Second World War. Let us avoid the fallacy of self-pity that leads every generation to suppose that it is peculiarly persecuted by history.

The real difference, I submit, is that Presidents who operated the system successfully knew what they thought should be done and were able to persuade Congress and the Nation to give their remedies a try. That possibility remains as open today as it ever was.

In his first year as President, Mr. Reagan, who knew what he thought should be done, pushed a comprehensive economic program through Congress—and did so with triumphant success in spite of the fact that the program is manifestly incapable of achieving its contradictory objectives.

He is in trouble now, not because of the failure of governmental structure, but because of the failure of remedy. If his program had worked, he would be irresistible.

OUR PROBLEM IS THAT WE DO NOT KNOW WHAT TO DO

Our problem today is not at all that we know what to do and are impeded from doing it by some kind of structural logjam in our political system. Our problem today is that we do not know what to do. We are as analytically impotent before the problem of inflation, for example, as we were half a century ago before the problem of depression.

Our leadership has failed to persuade a durable majority that one or another course will do the job. If we don't know what ought to be done, efficient enactment of a poor program is a dubious accomplishment—as the experience of 1981 surely demonstrates. What is the great advantage of acting with decision and dispatch when you do not know what you are doing?

The issues involved are not new. A century ago foreign visitors levied the same criticism against our governmental structure. Bryce, next to Tocqueville the most illuminating foreign analyst of American institutions, reported in "The American Commonwealth" the British view that the separation of powers, party indiscipline, and the absence of party accountability made it almost impossible for the American political system to settle major national questions.

He also reported the response to this criticism by American political leaders. It was not, in their judgment, because of defects in structure that Congresss had not settled these questions, but I quote Bryce:

> Because the division of opinion in the country regarding them has been faithfully reflected in Congress. The majority has not been strong enough to get its way; and this has happened not only because opportunities for resistance arise from the methods of doing business, but still more because no distinct impulse or mandate toward any particular settlement of these questions has been received from the country. It is not for Congress to go faster than the people. When the country knows and speaks its mind, Congress will not fail to act.

When the country is not sure what ought to be done, it may be that delay, debate, and further consideration are not a bad idea. And, when our leadership is sure in its own mind what to do, it must in our democracy educate the rest—and that is not a bad idea either. An effective leader with a sensible policy, or even—as in the recent Reagan case—with a less-than-sensible policy has resources under the present Constitution to get his way.

I believe that in the main our Constitution has worked pretty well. It has insured discussion when we have lacked consensus, and has permitted action when a majority can be persuaded that the action is right. It allowed Franklin Roosevelt, for example, to enact the New Deal but blocked him when he tried to pack the Supreme Court. The Court bill could not have failed if we had had a parliamentary system in 1937.

DO NOT NEED CONSTITUTIONAL CHANGE

In short, when the Executive has a persuasive remedy, you do not need a basic constitutional change. When the Executive remedy is not persuasive, you do not want basic constitutional change.

Politics in the end is the art of solving substantive problems. There is no greater delusion than the idea that you can solve substantive problems by changing structure.

My frank opinion is that this agitation about constitutional reform is a form of escapism, a flight from the hard problem, which is the search for remedy. Structure may become an alibi for analytical failure. Much as I enjoy this hearing as an intellectual exercise, I cannot refrain from the conviction that your committee would be spending its time more usefully in trying to work out serious answers to the substantive questions of unemployment, inflation, growth, and equity.

I must add that constitution-tinkering could become more than an agreeable intellectual diversion. If there were any reality to the prospect of basic structural change, it would be an enterprise overflowing with hazard.

Burke was right when he warned of the danger of digging into the foundations of the State. As Bryce put it, "It's hard to say, when one begins to make alterations in an old house, how far one will be led on in rebuilding."

Experiment through statute is comparatively harmless. If the law does not work, there is no great difficulty about repealing it. Experiment through constitutional amendment is a very different matter. Once something is in the Constitution, it's hard to get it out—unless it flagrantly offends the good sense and taste of the people, like the 18th amendment. And, once imbedded in the Constitution, "reform" may have unpredictable and far-flung consequences.

I speak with diffidence because of the weight of responsibility and authority my cherished friends, Secretary Dillon, Senator Fulbright, and Dick Strout bring to their advocacy of the parliamentary model; but I must disagree.

WEAKNESSES OF PARLIAMENTARY SYSTEMS

The argument for the parliamentary system is that the fusion of powers will assure cooperation and partnership between the executive and the legislative branches. In fact, fusion of powers assures the almost unassailable dominance of the executive over the legislation.

It is noted that the parliamentary system has marked superiority in the promptness and efficiency with which it enacts the executive program. This is true, but it is, of course, a function of Parliament's weakness, not of its strength.

Churchill made the point to Roosevelt in a wartime conversation:

> You, Mr. President—

Churchill said—

> are concerned to what extent you can act without the approval of Congress. You don't worry about your Cabinet. On the other hand, I never worry about Parliament, but I continuously have to consult and have the support of my Cabinet.

The Prime Minister appoints people to office without worrying about parliamentary confirmation, concludes treaties without worrying about parliamentary ratification, declares war without worrying about parliamentary authorization, withholds information without worrying about parliamentary subpenas, is relatively safe from parliamentary investigation, and in many respects has inherited the authority that once belonged to absolute monarchy.

As Lloyd George told the Select Committee on Procedure in Public Business in 1931, "Parliament has really no control over the executive, it is a pure fiction."

While American constitutional reformers muse about the virtue of fusion of power, British reformers yearn for the separation of powers. They want to set Parliament free. They want a formal written bill of rights.

They want standing parliamentary committees with increased professional staff and enlarged powers of investigation and oversight. They want the right to examine witnesses in committee during pending legislation. They want to reduce the power of the whip. They want to end designation of parliamentary candidates by the party organization in favor of open primaries.

They want fixed elections at regular intervals. A former Prime Minister spoke to me a few months ago with envy about our system of midterm elections.

> The only means we have between general elections of bringing national opinion to bear on national policies is through by-elections, and this depends on a sufficiency of MP's resigning or dying. Luck has been with Mrs. Thatcher, and she has had far less than average number of by-elections. How much better to give the whole country a chance to express itself every two years!

Fortunately, I think, given the nature of the American political tradition, the parliamentary system is an unreal alternative. The thought that in this era of conspicuous and probably irreversible party decay we can make our parties more commanding and cohesive than they have ever been is surely an exercise in political fantasy.

Centralized and rigidly disciplined parties, the abolition of primaries, the intolerance of mavericks, the absence of free voting—all such things are against the looser genius of American politics.

I would not want to conclude by leaving the impression that I'm opposed to all structural adjustments of our political system. I think there is much to be said, for example, for the proposal of Senator Pell to eliminate lameduck Congresses and lameduck Presidencies by providing that the new Congress after an election should begin on November 15 and the President and Vice President be inaugurated on November 20.

The length of our transition is a puzzle and bafflement to the rest of the democratic world, and we could do that with much greater efficiency.

I would solve the dilemma of the Electcral College by the "national bonus" plan recommended by the 20th Century Fund task force—which, by awarding a national pool of electoral votes to the winner of the popular vote, would assure the popular winner a majority in the Electoral College while still preserving the Federal system and avoiding a proliferation of Presidential candidates.

I favor reforms of the nomination process which would restrict primaries to a 3-month period in the spring of the Presidential year. I believe that television networks and stations, growing rich off the people's airwaves, should be required to provide free prime time to major political parties during Presidential elections.

I think we must consider a constitutional amendment overriding the *Buckley* v. *Valeo* decision enabling Congress to place effective limits on what candidates for President and Congress can spend on their campaigns.

I'm opposed to the direct election of the President, to the abolition of midterm elections, to the limitation of congressional terms, to the single, 6-year Presidential term.

I would conclude a reiteration of my plea earlier in these remarks: fascinating as constitution-tinkering may be, like the Rubik cube, let it not divert us from the real task of statecraft. Let us never forget that politics is the high and serious art of solving substantive problems. Thank you.

[The prepared statement of Mr. Schlesinger follows:]

PREPARED STATEMENT OF ARTHUR SCHLESINGER, JR.

POLITICAL ECONOMY

May I begin on a personal note?—with an expression of high regard for the eminent chairman of this Committee, an old friend; and of deep regreat for his decision to retire from this body, which he has served with such distinction for more than a quarter of a century. I have no doubt, however, that there is life after Congress; and that Henry Reuss's voice will continue to sound cogently forth in public discussion of the great issues of the day.

I am glad that he has chosen, as one of his concluding congressional acts, to emphasize the fact that economics, in its most honorable tradition, is "political economy"—economic analysis in the service of public policy. This set of hearings addresses two essential problems of political economy: how secure in fact are our demoncratic institutions against economic threat? and how well adapted is our governmental structure to making the decisions necessary to safeguard our democratic future?

I

If there are people today who think that nothing can ever threaten the stability of the democratic form of government, this complacency is a relatively recent phenomenon. The men who founded the republic were far from certain about its future. George Washington took care in his first inaugural to call the advanture in self-government an experiment. The Founding Fathers in general, as Woodrow Wilson later noted, "looked upon the new federal organization as an experiment, and thought it likely it might not last." Our wisest leaders have always understood that free government is a precarious undertaking. "Before my term has ended," John F. Kennedy said in his first annual message, "we shall have to test anew whether a nation organized and governed such as ours can endure. The outcome is by no means certain."

The threats to the republican experiment can come from the world outside, as from the militant totalitarian creeds of the 20 century. They can come as well from our own vanities, illusions and failures. Indeed, we have the authority of Abraham Lincoln in suggesting that, in the end, internal factors are decisive. If danger ever reaches us, Lincoln said, "it must spring up amongst us. It cannot come from abroad. If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide."

Of the various internal threats to democratic institutions, the economic lies within the particular province of this Committee. The economic threat may take a diversity of forms: acute and chronic depression; acute and chronic inflation; acute and chronic stagnation; acute inequity in the distribution of wealth and income. Over a century ago Karl Marx predicted that capitalism could not solve problems of this order and must in the end perish of its own contradictions. From time to time, as during the Great Depression, the dark Marxist forecast seemed on the verge of fulfillment. Yet half a century later the free economic system is still hanging in.

How has capitalism triumphed over the Marxist prophecy? It has not been through loyalty to the ideology of laissez-faire and to the gospel of devil-take-the-hindmost. Quite the contrary: it has survived precisely because of the continuing and remarkably successful invocation of government to humanize the industrial order and to rescue working men and women from the Dickensian excesses of the industrial revolution. It has survived because of the long campaign, conceived, organized and pressed by liberals—and very often resisted and resented by conservatives—to reduce the suffering, and thereby the bitterness and defiance, of those denied by accident of birth a decent chance in life. It has survived because the liberal democratic polity has made it a central purpose to combine individual opportunity with social responsibility.

What Marx failed to foresee was exactly the ability of democratic society to develop this sense of social responsibility. Some in high places today would have us abandon social responsibility in the name of unbridled individualism. They claim that the best way to meet our problems is to cut social programs for the poor and taxes for the rich. They would remove the protecting arm of the government from our industrial life, consign working people to the harsh mercies of the unregulated market and redistribute income from the poor and middle classes to the already affluent. These ideologies are in effect doing Karl Marx's work for him. Their policies are rekindling the fires of class war.

Moreover, the policies are manifestly not working. There must be some better way of dealing with the threat of inflation than by inducing mass unemployment, just as there must be some better way of dealing with depression than by reviving inflation, and as there must be some better way of enlarging economic opportunity than by redistributing income from the poor to the rich. The problem of achieving economic growth under conditions of widening economic opportunity remains a great vulnerability in the free system. Unless we come up with better answers than we have found so far, our troubles will deepen, and so will the threat to our democratic institutions. The search for remedy is a matter of extreme urgency.

II

This leads on to the second question: is the difficulty we encounter in devising effective remedy the consequence of defects in our leadership, or of defects in the structure of our government? Given the separation of powers, the erosion of party responsibility, the influence of single-interest groups and lobbies, is our political system capable any longer of making the decisions necessary to bring our problems under control? Has not the time come to demand basic constitutional change that, by checking or abolishing the separation of powers, will restore the capacity of government to act with decision and dispatch?

Such questions imply that we have only latterly fallen from a golden age in which the process of governmental decision was relatively efficient, political parties were disciplined and responsible and single-interest groups and lobbies were trivial or non-existent. But was there ever such a gold age? The historian is bound to observe that there is nothing especially new about the conditions that are supposed to have brought our system into its alleged present state of paralysis and crisis.

After all, we have had the separation of powers from the beginning of the republic. If parties arose in part as a means of overcoming the separation of powers and providing a link between executive and legislative, they have always done so in a haphazard way. We have never had the disciplined party operation required by the parliamentary system. The reasons for this were clear from the start. Tocqueville pointed them out a century and a half ago. Our legislators, as Tocqueville said, must always "think more of their constituents than of their party. . . . But what ought to be said to gratify constituents is not always what ought to be said in order to serve the party to which representatives profess to belong. . . . Hence it is that in democratic countries parties are so impatient of control and are never manageable except in moments of great public danger." Party indiscipline is hardly a latter-day novelty. A loose party system has been necessary to accommodate diverse interests and regions in a far-flung federal republic.

Nor can anyone who has read the 10th Federalist or recalls the Anti-Masons, the abolitionists, the nativists, the prohibitionists, the greenbackers and so on suppose that "factions"—single-issue groups—are an invention of the late 20th century. Nor can anyone who has read "The Gilded Age" by Mark Twain and Charles Dudley Warner or has meditated the gaudy 19th century career of Sam Ward, the King of the Lobby, take powerful lobbyists as an appalling innovation of our own times.

The constitutional reformers, in short, are protesting what have been in fact the routine conditions of American politics. Yet these conditions—the separation of powers and all the rest—have not prevented competent Presidents from acting with decision and despatch throughout American history. The separation of powers did not notably disable Jefferson or Jackson or Lincoln or Wilson or the Roosevelts. Why are things presumed to be so much worse today?

It cannot be that we face tougher problems than our forefathers. Tougher problems than slavery? The Civil War? The Great Depression? The Second World War?

Let us take care to avoid the fallacy of self-pity that leads every generation to suppose that it is peculiarly persecuted by history.

The real difference, I submit, is that Presidents who operated the system successfully knew what they thought should be done—and were able to persuade Congress and the nation to give their remedies a try. That possibility remains as open today as it ever was. In his first year as President, Mr. Reagan, who knew what he thought should be done, pushed a comprehensive economic program through Congress—and did so with triumphant success in spite of the fact that the program was manifestly incapable of achieving its contradictory objectives. He is in trouble now, not because of the failure of governmental structure, but because of the failure of the remedy. If his program had worked, he would be irresistible.

Our problem today is not at all that we know what to do and are impeded from doing it by some kind of structural log-jam in our political system. Our problem today—let us face it—is that we do not know what to do. We are as analytically impotent before the problems of inflation, for example, as we were half a century ago before the problem of depression. Our leadership has failed to persuade a durable majority that one or another course will do the job. If we don't know what ought to be done, efficient enactment of a poor program is a dubious accomplishment—as the experience of 1981 surely demonstrates. What is the great advantage of acting with decision and despatch when you do not know what you are doing?

The issues involved are not new. A century ago foreign visitors levied the same criticism against our governmental structure. Bryce, who remains next to Tocqueville the most illuminating foreign analyst of American institutions, reported the British view that the separation of powers, party indiscipline and the absence of party accountability made it almost impossible for the American political system to settle major national questions. He also reported the response to this criticism by American political leaders. It was not, in their view, because of defects in structure that Congress had not settled major national questions, "but because the division of opinion in the country regarding them has been faithfully reflected in Congress. The majority has not been strong enough to get its way; and this has happened, not only because abundant opportunities for resistance arise from the methods of doing business, but still more because no distinct impluse or mandate towards any particular settlement of these questions has been received from the country. It is not for Congress to go faster than the people. When the country knows and speaks its mind, Congress will not fail to act."

When the country is not sure what ought to be done, it may be that delay, debate and further consideration are not a bad idea. And if our leadership is sure what to do, it must in our democracy educate the rest—and that is not a bad idea either. An effective leader with a sensible policy, or even (as in the recent Reagan case) with a less than sensible policy, has the resources under the present Constitution to get his way. I believe that in the main our Constitution has worked pretty well. It has ensured discussion when we have lacked consensus, and has permitted action when a majority can be persuaded that the action is right. It allowed Franklin Roosevelt, for example, to enact the New Deal but blocked him when he tried to pack the Supreme Court. The Court bill could not have failed if we had had a parliamentary system in 1937. In short, when the executive has a persuasive remedy, you do not need basic constitutional change. When the executive remedy is not persuasive, you do not want basic constitutional change.

Politics in the end is the art of solving substantive problems. There is no greater delusion than the idea that you can solve substantive problems by changing structure. As Bryce wisely reminds us, "The student of institutions, as well as the lawyer, is apt to overrate the effect of mechanical contrivances in politics."

My frank opinion is that this agitation about constitutional reform is a form of escapism. Constitution-tinkering is a flight from the hard problem, which is the search for remedy. Structure is an alibi for analytical failure. Much as I enjoy this hearing as an intellectual exercise, I cannot refrain from expressing the conviction that your Committee would be spending its time far more usefully in trying to work out serious answers to the substantive questions of unemployment, inflation, growth and equity.

III

I must add that constitution-tinkering could become more than an agreeable intellectual diversion. If there were any reality to the prospect of basic structural change, it would be an enterprise overflowing with hazard. Burke was right when he warned of the danger of digging into the foundations of the state. As Bryce put it, using a similar metaphor, "It is hard to say, when one begins to make alterations in an old house, how far one will be led on in rebuilding."

Experiment through statute is comparatively harmless. If a law does not work, there is no great difficulty about repealing it. Experiment through constitutional amendment is a very different matter. Once something is in the Constitution, it is very hard to get it out—unless it flagrantly offends the sense and taste of the people, like the 18th Amendment. And, once imbedded in the Constitution, "reform" may have unpredictable and far-flung consequences, reverberating through the far reaches of the system.

I would urge particular caution with regard to proposals intended to reshape the American system on the British model of parliamentary government. The argument for the parliamentary system is that fusion of powers will assure cooperation and partnership between the executive and legislative branches. In fact, fusion of powers assures the almost unassailable dominance of the executive over the legislative. It is noted that the parliamentary system has marked superiority in the promptness and efficiency with which it enacts the executive program. This is true, but it is, of course, a function of Parliament's weakness, not of its strength. Under the parliamentary model, the legislative branch delivers whatever the executive requests. The no-confidence vote is so drastic an alternative that in Great Britain, for example, it succeeds in forcing a new general election only two or three times a century.

Churchill made the point to Roosevelt in a wartime conversation. "You, Mr. President," Churchill said, "are concerned to what extent you can act without the approval of Congress. You don't worry about your Cabinet. On the other hand, I never worry about Parliament, but I continuously have to consult and have the support of my Cabinet." Thus the Prime Minister appoints people to office without worrying about parliamentary confirmation, concludes treaties without worrying about parliamentary ratification, declares war without worrying about parliamentary authorization, withholds information without worrying about parliamentary subpoenas, is relatively safe from parliamentary investigation and in many respects has inherited the authority that once belonged to absolute monarchy. As Lloyd George told the Select Committee on Procedure on Public Business in 1931, "Parliament has really no control over the Executive; it is a pure fiction."

Congress is far more independent of the executive, far more open to a diversity of ideas, far better staffed, far more able to check, balance, challenge and investigate the executive government. Take Watergate as an example. The best judgment is that such executive malfeasance would not have been exposed under the British system. "Don't think a Watergate couldn't happen here," writes Woodrow Wyatt, a former British MP. "You just wouldn't hear about it." In a recent issue of the British magazine Encounter, Edward Pearce of the London Daily Telegraph, agrees:

"If only Mr. Nixon had had the blessing of the British system . . . Woodward and Bernstein would have been drowned in the usual channels, a D-Notice would have been erected over their evidence, and a properly briefed judge, a figure of outstanding integrity, would have found the essential parts of the tapes to be either not relevant or prejudicial to national security or both. The British system of protecting the authorities is almost part of the constitution."

While American constitutional reformers muse about the virtues of a fusion of powers, British reformers yearn for the separation of powers. They want to set Parliament free. They want a formal written Bill of Rights. They have achieved standing parliamentary committees and wish now to increase the professional staffs and extend the powers of investigation and oversight. They want the right to examine witnesses in committee during the consideration of pending legislation. They want to reduce the power of the whip. They want to end designation of parliamentary candidates by the party organization in favor of open primaries. They want fixed elections at regular intervals. A former Prime Minister spoke to me a few months ago with envy about our mid-term elections. "The only means we have between general elections of bringing national opinion to bear on national policies," he said, "is through by-elections, and this depends on a sufficiency of MPS resigning or dying. Luck has been with Mrs. Thatcher, and she has had far less than the average number of by-elections. How much better to give the whole country a chance to express itself every two years!"

Before succumbing to romantic myths of the parliamentary advantage, Americans would be well advised to listen to those who must live with the realities of the parliamentary order. But fortunately, given the nature of the American poliltical tradition, the parliamentary system is an unreal alternative. The thought that in this era of conspicuous and probably irreversible party decay we can make our parties more commanding and cohesive than they have ever been is surely an exercise in political fantasy. Centralized and rigidly disciplined parties, the abolition of primaries, the intolerance of mavericks, the absence of free voting—all such thngs are against the looser genius of American politics.

IV

I would not want to leave the impression that I am opposed to all structural adjustments of our political system. I think there is much to be said, for example, for the proposals of Senator Pell to eliminate lame-duck Congresses and lame-duck Presidencies by providing that the new Congress after an election should begin on November 15 and the President and Vice President be inaugurated on November 20. I would solve the dilemma of the Electoral College by the "national bonus" plan recommended by the 20th Century Fund task force—which, by awarding a national pool of electoral votes to the winner of the popular vote, would assure the popular winner a majority in the Electoral College while still preserving the federal system and avoiding a proliferation of presidential candidates. I favor reforms in the nomination process that would restrict primaries to a three-month period in the spring of the presidential year. I believe that television networks and stations, growing rich off the people's airwaves, should be required to provide free prime time to serious political parties during presidential elections. I think we must consider a constitutional amendment overruling the *Buckley* v. *Valeo* decision and enabling Congress to place effective limits on what candidates for President and Congress can spend on their campaigns.

But I am opposed to the direct election of the President to the abolition of midterm elections, to the limitation of congressional terms, to the single six-year presidential term. And I would conclude with a reiteration of my plea earlier in these remarks: fascinating as constitution-tinkering may be, like the Rubik cube, let it not divert us from the real task of statecraft. Let us never forget that politics is the high and serious art of solving substantive problems.

Representative REUSS. Thank you. The soft underbelly of the parliamentarians has been attacked. Your remarks will be the subject of some stimulating dialog.

We now turn to another admirable public servant, Elliot Richardson.

STATEMENT OF ELLIOT RICHARDSON, SENIOR PARTNER, MILBANK, TWEED, HADLEY & McCLOY

Mr. RICHARDSON. Thank you very much, Mr. Chairman and distinguished fellow panelists.

FAULT IS NOT IN OUR GOVERNMENT STRUCTURE, BUT IN OUR POLICIES

I am inspired by the example of Professor Schlesinger to another historic allusion, one to the emphasis placed by Madison on the role of factions and the distillation of sound policy from the competition among them. He also recognized, however, Mr. Chairman, that for our system of checks and balances to work effectively, there would have to be the contributions of individuals whose own sense of commitment to the general welfare on a broader base than factionalism would be necessary, particularly in times of crisis.

We have been fortunate, throughout the history of this Republic, that there have always been individuals whose perception of the public interest transcended factionalism. You, Mr. Chairman, in the course of your congressional career, have epitomized that approach. And as my colleagues on this panel have already said, it is certainly fitting that you should conclude your distinguished career of congressional service—I stress the words "career of congressional service," because I have confidence that there will be many other forms of service lying ahead—with a hearing that so manifestly addresses significant and enduring problems on what is obviously a nonpartisan basis.

Having said that, Mr. Chairman, I hope that what I am about to say does not blight the otherwise bright political future of the gentleman on my immediate right. The fact is, however, that I embrace in its totality the fundamental conservatism of the testimony he has just given. The fault, in my view, is neither in our stars nor in our structures, but in our policies or the lack of them. There is no indication, so far as I am aware, that transcendence of the checks and balances of our system would have produced a better result at this date. And it is for the reason that Professor Schlesinger has already emphasized, that it is not convincing at this stage that anyone knows how to reach a better result or that greater authority to enact it would make it more likely.

I would not, therefore, wish to see reforms that simply made it easier for people who believe they are experts, or who are convinced of the wisdom of their often simplistic solutions, to be able to carry them out. On the contrary, I think that there may well be some advantage, already sensed by the American people, in having a split of party control between the Executive and the Congress. We have had such a split more often than not in the last several decades, and no doubt, this is because people feel that, on the whole, they would rather not put too many eggs in the basket of either party's policies; that the society is so complex and its economy so complex, that we are likely to succeed in coping with our problems only through combinations of partial remedies, partially carried out, and hope that from time to time they will at least be convergent.

At any rate, it seems to me that the effort to develop convergent policies coherent in their general sense of direction and strategy, may well be the best that we can hope for.

As to the security of the system, it seems to me that we have at least the assurance that it has weathered extraordinary stress in the past: A civil war, world wars, the Great Depression, Watergate. I would agree, Mr. Chairman, that the concern voiced in your letter of September 29 with respect to the problem of joblessness could become a matter of very serious concern, and even a threat to security if sufficiently prolonged and aggravated. And I believe that it should be a responsibility of the executive branch as well as the Congress to focus attention on that problem and to mobilize more adequate remedies for it.

NEED GREATER CAPACITY TO UNDERSTAND OUR SYSTEM

That, of course, brings us back to the question of the adequacy of policy, what the remedies are. And here, I have come to the only positive suggestion I have as to how the system might be made to work better, but that would not entail any structural reform; rather, the creation of a greater capacity to understand the system. Ironically, Americans have resisted the effort to develop deeper understanding of the system of systems comprising our society, because there has been a tendency to assume that if you accumulated enough information, you would want to convert it into a central planning process, whereas I believe, in fact, the opposite is true; that if you wish to preserve the maximum scope for freedom for the individual and for private enterprise, you need to understand the system better than you need to understand it if you have already assumed total control of it. You need to understand it better because you wish to avoid the suboptimal effects of interventions that don't work and which thus lead to further interventions to correct these side effects.

And so I am an advocate of the development of more adequate data collecting and analytic capacity on the part of the Government, a coordinated effort to build better models for the understanding of current and long-term trends in order to focus future policies on the correction of tendencies that seem to be indicated by the best available data and the most careful possible analysis. That, it seems to me, would create a base for planning not simply by Government itself, but by individuals and corporations whose long leadtime decisions need to be based on the most adequate possible information.

As to the parliamentary system or any other such radical revision, or perhaps I should say as to the parliamentary system in particular, I really can't add to what Professor Schlesinger said, except to say that it seems to me that to think about its potential application to the United States requires the recognition that ours is an extremely complex society with regional, ethnic, economic interests of enormous diversity. In my view, we have been fortunate that the Constitution provided for a fixed term for a Chief Executive and for the election of Members of Congress at specified intervals, and as a consequence that the Chief Executive or the would-be Chief Executive has had to create as broad a coalition of support as possible in order to have a chance of capturing the White House. The necessity for the creation and preservation of that kind of coalition has been fundamental to the degree of success that we have achieved. Conversely, in my view, to attempt to draft for the United States anything comparable to the British parliamentary model would, I think, lead to radical instability.

I believe that in the United States the application of the parliamentary system would, by comparison, make Italy look like the Rock of Gibraltar.

As to party responsibility, I have only one useful thought, much along the lines of the point previously made by Senator Fulbright, and that is, that we should and can do a better job of nominating candidates, and there have, of course, been studies of how this might be done better. On that score I would agree with most of Governor Sanford's recent Commission recommendation.

Thank you, Mr. Chairman.

Representative REUSS. Thank you, Mr. Richardson.

Because we hope that the record of these proceedings can be something of a source for those of us who are interested in studying the problem in the years ahead, I am going to include at this point in the hearing record Federalist Paper No. 10, Madison on Factions, because both Mr. Schlesinger and Mr. Richardson mentioned it, and because it is indeed a paper proper to be included in this record.

[The paper referred to follows:]

[10]

MADISON

THE SIZE AND VARIETY OF THE UNION AS A CHECK ON FACTION

To the People of the State of New York:

Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administrations.

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other: and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property; the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power;

or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufacturers? Are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they over burden the inferior number, is a shilling saved to their own pockets.

It is in vain to say that enlightened statemen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is, that the causes of faction cannot be removed, and that relief is only to be sought in the means of controlling its effects.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people. The question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations:

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practise with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the Society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the most easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic,—is enjoyed by the Union over the States composing it. Does the advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union, increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such as malady is more likely to taint a particular county or district, than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.

PUBLIUS.

Representative REUSS. We will follow with Mr. Strout now.

STATEMENT OF RICHARD L. STROUT, CORRESPONDENT, CHRISTIAN SCIENCE MONITOR

Mr. STROUT. I have a double embarrassment here. I feel that instead of sitting with these distinguished gentlemen, I should probably be over at the press table. The second embarrassment is that most of the arguments that I have prepared—I wasn't quite certain how deeply we would go into this—have already been given. But, from the point of view of a long perspective in Washington, I have reached very firm, arguable conclusions.

WE HAVE A CLUMSY AND DANGEROUS FORM OF GOVERNMENT

I started work in Washington for the Christian Science Monitor in 1922 and have been here ever since. Sixty years ago, this was a provincial city. Street cars bounced along Pennsylvania Avenue. Over in Virginia, signs ordered blacks to move to the back of the cars, and Herbert Hoover's great new Commerce Department building was yet to be built.

At my first Presidential press conference, President Harding stood behind his desk in the Oval Office in plus fours and pleaded with reporters not to ask him difficult questions because he wanted to play golf. [Laughter.]

I wish to attest that, since George Washington, we have had no more handsome President than Mr. Harding, to whom I lost my heart at once. [Laughter.]

We are the only nation with our system of separated powers. I increasingly feel that it is a dangerous form. We have, I think, a clumsy and dangerous form of government. I have seen national dissatisfaction grow. I believe in recent years, the public is still searching for the cause. Former Presidential counsel, Lloyd N. Cutler, observed,

> The public and the press still expect the President to govern, but the President cannot achieve his overall program, and the public cannot fairly blame the President because he does not have the power to legislate and execute his programs.

My colleague, James Reston, of the New York Times wrote, "We have a crazy, complicated nominating and election system. Everybody feels trapped in this system, and the result is left to accident, money, publicity, and luck."

I am going to skip some of the other citations that I have here. One I insist on reading, however, is by Douglas Dillon, and it was given at Tufts on May 30 of this year. He blamed:

> The inability to place responsibility on any one person or group. No one can place the blame for the consequent deadlock. The President blames the Congress, the Congress blames the President, and the public remains confused and disgusted with Government in Washington.

Are we approaching that spot again? Or perhaps are we already there? President Reagan for 2 years has been trying to get control of the budget, the basic tool of government. He hasn't succeeded. In Ottawa, in London, in the out-of-the-way parliament of Barbados, a government of either party presents its budget at the start of the new term. If it is seriously altered, the Government calls a nationwide election. The budget has a father; it isn't just a child from an orphanage. You know who's in charge. Do you know that today in Washington?

I give figures here, which I will not repeat, about the low turnout at our midterm election, which we were very proud to have rise to 40 percent. In the Presidential election, we are quite proud of the fact that it is, I think, about half of those eligible to vote who vote, but the number who vote has been going steadily down.

Like others I have already heard, I quote Lord Bryce's comments that were made a century ago, his famous chapter 8, "Why Great Men Are Not Chosen President." He said, "The method of choice does not bring great men to the top." "Emphasis," he said, "is on electibility rather than on greatness, and the mediocre man has fewer enemies."

There is, it is true, a deep and almost religious feeling among Americans that the Founding Fathers knew best. There is a feeling that the hallowed Constitution make us the best and most successful Nation on Earth.

Certainly the document is a noble one, but is constitutional sanctification wise?

I am told that of the 100 or so nations that have changed their form of government since World War II, not 1 chose the American system of separation of powers. Europeans pick their leader by a caucus of party peers.

I was in London last summer and looked down on the House of Commons from the press gallery. An American looks down the hallowed walls of Westminster and watches Prime Minister Margaret

Thatcher take on with a kind of maternal air the leaders of the opposition party. They are face to face over a little cleared quadrangle with a gold mace in front and order preserved by the speaker wearing a wig.

By contrast, President Reagan has held 14 formal press conferences at the White House. He holds them when he wants, and the questions are left, of all people, to the journalists who are there to ask the questions. We do the best we can, I think. We rarely have the followup questions that they have in the House of Commons, where the opposition itself is asking the questions.

Is it any wonder that that is an electrifying experience, to look down and see that give-and-take between the leaders of the opposition and the leaders of government?

The parliamentary system is a collective leadership.

By contrast with Jimmy Carter and President Reagan—who never served in Congress before coming here—since 1945, the length of the average parliamentary apprenticeship of a newly installed Prime Minister, I believe, has been 23 years. And Winston Churchill, who I once saw introduced by Franklin Roosevelt at the White House—we couldn't see him, we asked him to stand up, and he stood up on a table so we could see him better—before he became Prime Minister had served 40 years in Parliament. He knew the ropes.

HOW A PARLIAMENTARY SYSTEM WOULD WORK

What, then, is this so-called parliamentary system?

If a Canadian came down from Ottawa to organize it for us, it might go something like this:

The ceremonial President would live in the White House as a national symbol of our strength and unity. He would be ceremonial head of state but not of Government. He would, I imagine, be a respected Eisenhower-type figure.

Actual Government would rest in the party majority up here on Capitol Hill, which would choose its leader, who would be Prime Minister. The minority would form the loyal opposition, the Government in waiting.

When the parliamentary government was unable to get a majority on an important matter, it would be obliged to call a general election for a new Parliament. Elections would be mandatory in any case every 5 years.

There would be a merging of powers of the Senate and the House, and there would no longer be the sharp separation of the executive and legislative powers. The Executive would be, in fact, a committee of the Legislature. Its top leaders would probably hold Cabinet posts.

People like spectacles, and under this new American system there would be, I imagine, a ceremonial performance at least once a year, when the President, with an impressive marching parade of colorfully uniformed soldiers, would travel from the White House up flag-draped Pennsylvania Avenue to open Congress. He would read from the rostrum his speech on public policy, which would have been written for him by the majority party and would vary by whichever party was in power.

I am offering, of course not too seriously, an extreme form of what a change to a parliamentary type system would be.

We instinctively recoil and say we will hold on to the tried and true system bequeathed by our ancestors. An irony here is that, unknown to most Americans I believe, we have long since dropped a cardinal political credo of our ancestors.

In 1787, political parties were anathema. "The wise men of the day hated the very thought of unbridled factions and parties," writes historian James MacGregor Burns.

> Thomas Jefferson declared, "If I could not go to heaven but with a party, I would not go there at all."

Checks and balances, the fragmentation of power in Washington—this is part of the defensive mechanism against tyranny, evil parties, or monarchs.

Says Professor Burns:

> The Constitution had been designed to balance, fragment, and overwhelm the play of party power, staggered elections, fragmented constituencies, the separation of power between President and Senate and House, the division of powers between Nation and State. All were intended to compel conciliation among and between parties and factions to break the thrust of popular majority * * *".

Here is a different example. At one time or another, both Jimmy Carter and Walter Mondale advocated letting Cabinet members sit in the Senate or perhaps even allowing the President to select part of his Cabinet from Congress.

This would reduce the gap, of course, between executive and Legislature, but to achieve it the Constitution would have to be amended. The Constitution, in article I, section 6, paragraph 2, forbids a legislator from taking an executive office while serving in Congress.

Anxiety is growing, I believe, over our system of hovering deadlock. Never has any one office had so much power as the President of the United States possesses.

Writes Godfrey Hodgson, "Never has so powerful a leader been so impotent as to what he wants to do, what he has pledged to do, what he is expected to do, and what he knows he must do."

Washington is a laboratory to watch this system at work.

I think most of us remember Lyndon Johnson's press secretary, George E. Reedy, a former colleague of mine. In his book, "The Twilight of the Presidency," he predicted a nasty result. He predicted a dictator. "There will be a man on horseback," he said. "It is certain that, faced with a choice of chaos or suppression of dissent, most people will accept the suppression of dissent. In this probably lies the twilight of the Presidency."

I recall here what some others have already mentioned, that here in Washington last month a group of citizens formed the Committee on the Constitutional System. A joint call was sent out by Lloyd Cutler and my friend C. Douglas Dillon. Also participating were Robert McNamara, former Secretary of Defense, and others.

The group is privately financed, with the address of the National Academy of Public Administration, of this city.

America will shortly be celebrating the bicentennial of the most radical and successful Government perhaps ever launched and the oldest continuous Constitution in the world. Besides parades and fireworks, I hope we will also examine some of the problems that have emerged.

Thank you.

[The prepared statement of Mr. Strout follows:]

PREPARED STATEMENT OF RICHARD L. STROUT

I am glad to accept your invitation to discuss the difficulties this country has experienced in recent years in reconciling the structure of our government with the structure of our economics.

I started work in Washington for The Christian Science Monitor in 1922 and have been here ever since. Sixty years ago this was a provincial city. Street cars bounced along Pennsylvania Avenue; over in Virginia signs ordered Blacks to move to the back of the car; Herbert Hoover's great new Commerce Department building was yet to be built. At my first presidential press conference President Harding stood behind his desk in the Oval office in plus-fours and pleaded with reporters not to ask him difficult questions because he wanted to play golf. (He was the handsomest president since George Washington!)

We are the only nation with our system of separation of powers: I increasingly feel that it is a dangerous form. Much of the economic difficulty discussed in testimony before this committee in past months stems, I believe, from structural problems: the tendency to stall and deadblock is built into our checks and balances: the complexity is greater, the pace faster, and the nuclear risks immeasurably greater. We have, I think, a clumsy and dangerous form of government.

I have seen national dissatisfaction grow, I believe, in recent years but the public is still searching for the cause. Former presidential counsel Lloyd N. Cutler wrote in the fall of 1980, "The public and the press still expect the president to govern. But the president cannot achieve his overall program, and the public cannot fairly blame the president because he does not have the power to legislate and execute his program."

James Reston wrote (Feb. 8, 1980), "We have a crazy, complicated nominating and election system; everybody feels trapped in the system, and the result is left to accident, money, publicity, and luck * * *"

Here is a comment from James McGregor Burns (The Crisis of Public Authority): "The near break-down of government, the despair and disillusion of thoughtful people over the incapacity to solve our problems under an antiquated governmental system, booby-trapped with vetoes and purposedly designed self-limiting divisions of power * * * Instead of taking a swift jet plane across the Atlantic of our difficulties we still set sail in a noble but barnacled Mayflower."

And Time magazine asked readers (Dec. 15, 1976), "Can anyone remember when he last went to vote for a U.S. President and felt both enthusiastic and confident?"

I believe this feeling is beginning to shift from blaming the president to questions about the presidential system itself. In a recent article in Foreign Affairs: Fall, (1980) Lloyd Cutler noted the accumulation of problems in the American polity: budgets out of control, proliferation of interest groups, slack party discipline, and inability to place responsibility. He called for intensive study of the possibility of a shift to some form of parliamentary system.

At Tufts, May 30 of this year, former Treasury Secretary Douglas Dillon blamed "inability to place responsibility on any one person or group. No one can place the blame for the consequent deadlock," he said. "The President blames the Congress, the Congress blames the President, and the public remains confused and disgusted with government in Washington."

Are we approaching that spot again, or are we already in that spot?

President Reagan for two years has been trying to get control of the budget, the basic tool of government. He hasn't succeeded. In Ottawa, in London, in the out-of-the-way parliament of Barbados, a government of either party presents its budget at the start of the new term. If it is seriously altered, the government calls a nationwide election. The budget has a father; it isn't a child from an orphanage. You know who's in charge. Do you know that today in Washington?

Lacking a clear sense of paternity there is an attitude of "what's-the-use?" at elections. In our midterm election just completed the voter turn-out was fractionally greater than at midterm, four years ago. We were gratified, but the total was around 40 percent of the total, but this is still strikingly low. There is always a bigger turnout in a presidential election but the ratio is dropping here, too. Here is the percentage in the last five elections: 1960—64 percent; 1964—61.7 percent; 1968—60.7 percent; 1972—55.4 percent; 1976—54.4 percent, and 1980—only 53.9 percent. In short, in the world's greatest democracy only about half the voters vote. Comparative recent foreign figures are Great Britain—76 percent; France—82.8 percent; West Germany—91 percent.

Here are other examples of lassitude in the system. We haven't had a president who served two full terms since Eisenhower. Again, a lot of people have the feeling that our electoral process has not been giving us candidates of superlative rank. Is it their fault or our system of selecting them? There is nothing new in the question. Lord Bryce in his classic "The American Commonwealth" in 1893 headed Chapter 8; "Why great men are not chosen president." He said that the method of choice does not bring great men to the top. Emphasis, he said, was on electibility rather than on greatness, and the mediocre man had fewer enemies.

The United States, I believe, is the only functional democracy that separates the Executive from the Legislature. The system has some advantages. It normally requires moderation, deliberation, and compromise. But the cost in delay, I believe, is steadily rising. We need only look around ourselves now; presumably we shall work out of it. But in a great crisis it tempts the use of shortcuts and subterfuges. Some of these are dangerous: did we really learn anything from Watergate? And there is another aspect, what amounts to an unwritten part of our Constitutional process; in any major national crisis the unwritten rule is that the President assumes quasi-dictatorial powers. Abraham Lincoln did: he cut constitutional corners. Richard Nixon did in Viet Nam. Every war provokes the urge to speed things up and use emergency powers.

There is a deep and almost religious feeling among Americans that the Founding Fathers knew best. There is a feeling that the hallowed Constitution made us the best and most successful nation on earth. Certainly the document is a noble one. but is Constitutional Sanctification wise?

I was in London last summer and looked down on the House of Commons from the press gallery. I am told that of the 100 or so nations that have changed their form of government since World War II, not one chose the American system of separation of powers. Europeans pick their leader by a caucus of party peers. An American looks down in the hallowed walls of Westminister and watches Prime Minister Margaret Thatcher take on, with a kind of maternal air, the leaders of the Opposition parties; they are face to face over a little cleared quadrangle with the Gold Mace in front and order preserved by the Speacker wearing a wig. President Reagan can hold formal press conferences at the White House when he wants and has held 14 so far with the questions put by reporters; Mrs. Thatcher, by contrast, is required to appear twice a week at Question Time, flanked by her cabinet, to engage in a trial of wits with her political adversaries. No wonder the political attention is high with such confrontations.

Several other contrasts are worth noting. The parliamentary system emphasizes collectivized leadership. Neither President Carter nor President Reagan every served in Congress before coming to Washington. By contrast since 1945 the length of the average parliamentary apprenticeship of a newly installed prime minister in Britain has been 23 years. Winston Churchill served 40 years in parliament before becoming prime minister.

Again, since parliamentary leaders are known, an election is merifully short, generally two or three weeks. By contrast our 1984 election has already begun, in effect: ultimately there will be 37-odd primaries before the formal show-down finally occurs.

What then, is so-called "parliamentary system"? If a Canadian came down from Ottawa to organize it for us it might go something like this. The ceremonial President would live in the White House as a national symbol of our strength and unity. He woud be ceremonial head of state but not of government. He would, I imagine, be a respected Eisenhower-type figure. Actual government would rest in the party majority on Capitol Hill which would choose its leader, who would be prime minister. The minority would form the loyal opposition, and government-in-waiting.

When the parliamentary government was unable to get a majority on an important matter it would be obliged to call a general election for a new parliament. Elections would be mandatory in any case every five years. There would be a merging of powers of the Senate and the House, and there would no longer be a sharp separation of Executive and Legislative powers. The Executive would be, in fact, a committee of the legislature. Its top leaders would probably hold cabinet posts.

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"The wise men of the day hated the very thought of unbridled factions and parties," writes historian James MacGregor Burns ("The Vineyard of Liberty" 1982.) Thomas Jefferson declared, "If I could not go to heaven but with a party, I would not go there at all."

Checks and balances, the fragmentation of power in Washington. . . this was part of the defensive mechanism against tyranny either of parties or monarchs. Says professor Burns: "The Constitution had been designed to balance, fragment and overwhelm the play of party power. Staggered elections, fragmented constituencies, the separation of power between President and Senate and House, the division of powers between nation and states—all were intended to compel conciliation among and between parties and factions, to break the thrust of popular majorities. . ."

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Anxiety is growing, I believe, over our system of hovering deadlock. "Never has any one office had so much power as the president of the United States possesses," writes Godfrey Hodgson ("All Things to All Men" Knopf, 1981). "Never has so powerful a leader been so impotent to do what he wants to do, what he is pledged to do, what he is expected to do, and what he knows he must do."

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Representative REUSS. Thank you, Mr. Strout.

And now, to close the panel, Senator Hugh Scott.

STATEMENT OF HUGH SCOTT, FORMER U.S. SENATOR

Mr. SCOTT. Thank you, Mr. Chairman. As with my colleagues, I join in the very widespread regret that our distinguished Chairman is ending a long period of great and worthwhile service, which the Romans would describe as deserving well of the Republic.

I think that also we ought to rejoice with him that this marks the end of his personal sacrifice to public service. And I am sure much challenging, exciting and rewarding good things await him in the future.

CAN'T SOLVE PROBLEMS BY CHANGING STRUCTURE

We are speaking, I think, from experience, and I speak from 34 years in the Congress, and my first reaction, perhaps, is that I recall that all of the problems before those Congresses, 77th and so on, were somehow solved, were solved with brilliant inspiration, others perhaps by benign neglect.

But I don't think, as we look back, we can recall much debris of unsolved problems. Somehow the Congress and the President worked it out, as they have been doing for quite a long time.

I had intended my theme to be that which Dr. Schlesinger has stated better, that is, there is no greater delusion, as he says, than the idea we can solve substantive problems by changing structure.

I also agree with him, when he says when the executive has a persuasive remedy, they do not need basic Constitution change. When the executive remedy is not persuasive, they do not want basic constitutional change. So I will address myself later just to two aspects of proposed constitutional change.

The general rule, I think, could be that we should ask ourselves, is it broke? And if it isn't, don't fix it.

Congress suffers much criticism through its delays in bringing about solutions. I have in mind, social security. Many people would think that the ideal time to solve the highly dangerous political question of social security would be during this lameduck period. Political considerations appear to dictate otherwise. One is tempted to believe that the social security problem is heading now for a substantial drain on the general revenues. That is one solution. It will probably not be solved until Congress has assisted in maneuvering a serious crisis and will be solved when the alternative is the dissolution or bankruptcy of the system. Congress, of course, wants to be pushed into the solutions, and I believe it will arrive ultimately at achievement of political dangerous decisions, when one considers the alternatives. It's like having birthdays. They are, indeed, to be preferred to the alternative.

So that we can expect, as we always have had in this country, a Government by crisis management or various games, successive games of legislative chicken. It is built into the system.

And I think that the proposals to restructure Congress seem more often to be designed to make Congress more efficient, which, I suppose, is a noble enterprise in itself, but we ought to remember that the Founding Fathers designed this system, based on the interaction of mutual distrust. The offer to solve our problems by pieces of paper will not serve to remove legislative and Presidential tensions. We already have a piece of paper. It is called the Constitution, and there has never been an age, a golden age of government efficiency, as Dr. Schlesinger has also noted.

CHANGES CAN BE MADE IN EXISTING STRUCTURE

I would comment on certain specifics. I was a member of that odd couple of Senator Ted Kennedy and myself in long sessions of a conference group on the Federal Elections Commission. We fought very hard for public financing of Congressional elections. I still favor that. Members prominent in my party don't because there are less of us around than the other party, but in my view, we are coming to it sooner or later, and the sooner the better, and it should be accompanied by reforms in the electoral system, by some limitations on the power of the PAC.

I submit to the Chairman that I am personally active in the promotion of PAC's. We live within the system, but it is not a good system, in my judgment, as presently devised.

Perhaps Congress ought to give more consideration to the line item veto as a more efficient and more effective way of gaining the President's and the Congress' attention to specific items, to which he disagrees with the Congress, rather than to have to rewrite a $30 billion package.

Single-issue interventions by groups or Members of Congress are cited as annoying, in contravention perhaps of the general public interest. As I look back on the activities of single-issue groups, however, I think they have, on the whole, been largely unsuccessful, because they have stimulated a reaction usually even or greater than the original stimulus that inspired it.

I think the ultimate answer then is not to restructure the Congress, but to seek, if we can, through information and through establishment of standards and with the help of the media, perhaps to restructure the people who make up the Congress and the executive. Restructure them to a general pressure for better attitudes and for the selection of persons with better attributes. Here, of course, the media, it seems to me, instead of looking always on the dark side of the issue, might celebrate more creditably the gallant, courageous, and brilliant achievements of individuals as they struggle to realize themselves and their place in the system.

I would like to see a return to bipartisanship of the Vandenberg type in foreign policy. I think we have dangerously gotten away from the concept of being consulted at the laying of the keel, rather than at the launching, on the concept that partisanship ends at the shores. We don't have shores anymore in space. We have to face the fact that we are either bipartisan in our approach to foreign policy, or we aren't. This doesn't mean foreign policy shouldn't be constructively questioned. Disagreements should be welcomed, but in the ultimate aspect, bipartisanship is better for this country than partisanship, when we are dealing with the national security.

As to electoral—the electoral system for President, I have long favored the Lodge-Gosset approach for reasons. You will recall that that unsuccessful recommendation would have provided for the election of the President and Vice President by congressional district with at large credits, of course, to each State as representing the State's senators. This, it seems to me, would have recognized the great diversity of Americans, and that the Bronx and Kansas, the Sun Belt and the Grain Belt, would all be involved in the selection of the future leaders of this country.

I think it would be a good thing. I don't care whether you keep the Electoral College or not. They have one banquet every 4 years, and other than that, serve no function any more than the counters in a game of Monopoly would serve.

CAMPAIGN FINANCING

I also agree with what has been said about Buckley and Valeo. The Supreme Court has perpetrated some dreadful opinions in the course of time, dreadful according to where you stand, I'm sure.

But perhaps one of the worst was this syllogism they evolved in Buckley against Valeo. As I read, that money—we must start with the assumption that money is power. We have just seen it on this first Tuesday after the first Monday of this month. The Court has advanced that, that money is speech. And therefore, by the Court's reasoning, money is freedom, and by my reasoning that's a lot of bad nonsense. It has served to release those people with tremendous sums of money to do what they want with it.

I don't know any other aspect of interpretation of the laws where the courts have said that the mere possession of money warrants you in engaging in any excesses you want with it, while the person without money stands helplessly aside and wonders exactly what the Court had been sniffing at the time they wrote that decision.

I perhaps am the only person I know who favors a 7-year Presidential term. If there were to be a Pell amendment and the Pell amendment is well-conceived, we are going to go that route, I would personally advocate all by myself the 7-year term. Why? Because then each new President—that's a single term—would face a different kind of American constituency. At the end of one 7-year period, he would be running with so many Senators and perhaps a part of the Congress, if you changed that too, and made it a 4-year term for the House.

At another time, it would be principally local elections, people interested in the sheriff and the row offices, as we call them, and so on. Each constituency would be a variance from the constituency that the previous campaign was addressed to.

I think it is an attractive idea, and I wish somebody else would give it some thought.

Then the question that has been mentioned as to whether President Reagan has lost his coalition. I have been asked that. I think, myself, that he has not, if he moves toward the center. Of course, he has, if he remains intransigent and confused, but should he move to the center, every President could make a new coalition. And they usually do, according to circumstances. Since he is the ex-Governor of California, I would not too readily assume that the coalition has been lost. It's just been mislaid until a new and handsomer coalition can be discovered.

What does the public say to our Government? Well, I take certain pride in saying that on election day I predicted exactly the House of Representatives and Governors and missed the Senate by two. I was a little better than Gallup and Cronkite, if I must say so in modesty. But then I thought I was anyway.

What is the public saying? I think it is saying, "Continue to do what you've been doing, but do it better, and for God's sake, do it soon."

I visited once, and this is by way of conclusion—I visited once the government officials of Papua, New Guinea. They have a balanced budget, a favorable balance of trade, a very strong currency, and two-thirds of the members of that party are illiterate.

Would we change places with them? Thank you. [Laughter.]

CAN ECONOMIC PROBLEMS BE SOLVED BY CHANGING FORM OF GOVERNMENT

Representative REUSS. Thank you, Senator Hugh Scott. Thanks to all for a memorable contribution. It turns out that the seating arrangements—I don't think were planned that way—have delineated a very even policy dispute. In the center sit Mr. Schlesinger, Mr. Richardson, and Mr. Scott, who by and large state that our present system, for all its faults, is perhaps the best that can be done, and that the fault lies not in the structure of our system but in the inability of those who are now part of the system to find better solutions to our problems. They are surrounded by Mr. Dillon, Mr. Fulbright, and Mr. Strout, who believe that thoughtful attention has to be given as to whether there aren't opportunities in the general direction of the parliamentary system which might improve matters.

I know Mr. Dillon has to go in just a minute, and I might ask you before you go if you would care to comment on what the Schlesinger-Richardson-Scott bloc have had to say, and how a more effective form of government could help solve our permanent, burning economic problems—the existence of intolerable unemployment and inflation in recent years, the lack of harmony throughout the world in the economic relations among the various countries, the steadily worsening distribution of wealth in this country.

How would you answer somebody who says those problems are soluble only in the realm of economics, and that better structures of government wouldn't necessarily help solve the problems?

ARGUMENTS IN FAVOR OF CHANGE

Mr. DILLON. Thank you, Mr. Chairman. I would be glad to comment. As I mentioned earlier, my views and the views of the group in getting together to talk about this question of what is primarily needed now is that a very serious analysis of all the possible alternatives, including constitutional reform, that would improve the functioning of our Government is required. I think there is general agreement that it has not been entirely satisfactory.

There is a question which I will raise, which I will try to answer a little later. It is a historic fact that there never has been entirely satisfactory, except for the few times of great crisis. In this study, one of the things, the most important, I think, is to reduce the separation of powers for the purpose of enabling the public, the voting public, to more clearly hold accountable those in authority.

There now is no way that we can find out who is responsible, because the President's program, regularly, a program of party conventions, party documents, platforms, is never enacted. They say President Reagan's program was enacted. It was, to some extent, but certainly the tax reduction bill which was finally enacted bore little resemblance to what the President originally recommended.

It has all sorts of Christmas tree ornaments added to it, so that the reduction in taxes was very markedly increased over what had been originally proposed, and it was really quite a different piece of legislation.

Also it's very clear that if the President had had the ability to put a program into effect, it probably would have been some earlier reform of entitlement programs, including social security, and we would not be facing today the sort of $170 billion deficit which we are facing in this current year, with no indication that it will greatly improve in the future.

In looking at these different parliamentary systems, we tend to think only of the British, which system is the mother of parliaments, and which is the one most usually contemplated, but we can have a parliamentary system with a strong president, which is the French system, where there is a president elected for a fixed term. It happens to be 7 years. The same term that Senator Scott was talking about. And he is a very strong executive, in fact, I think considerably stronger that the President of the United States, who is often referred to as the strongest executive officer in the world, which I don't think is true anymore.

So much for the various things that might be studied and thought of. There is some thought that has been seriously discussed of finding ways of requiring Members of Congress and Members of the Senate to run on one line with a candidate for President when he runs. That would seem to require them to support his policies, which they now feel no very great necessity to do.

The place where I am afraid that I part company with my friend, Arthur Schlesinger, a bit is on what the situation is that we face today. I think it is different than the situations that we have faced heretofore in the history of our democracy, of our Nation. What we are trying to—we should never lose sight of what our primary objective is, which is to attain and maintain individual liberty, which is so essential to our democratic system. It is an essential element. That can be endangered in two ways. One is by war in modern conditions, and the other is by the possibility of a major economic collapse. The dangers of both of these things, I think, are far greater today than they have been probably at any time.

Certainly, in foreign affairs, the threat of a nuclear war is something that is quite different. What the threat of conflict is now, the United States is no longer a protected, isolated by distance from such a conflict. It makes the situation far more dangerous than existed in previous world wars, which were not world wars at all, in the sense that they would be in the present situation, because the United States was a haven, because it was so far away, and the wars were fought elsewhere. That would not be the case, if one should occur in a major conflict.

Therefore, I think this situation is much more serious.

The present situation in foreign policy, where it is very difficult for our allies, maybe almost impossible, for our allies or for those who differ, to really know what the United States policy really is. And that is, again, basically, because of the separation of powers, where what the President states to be the policy of the United States can be, and often is, changed by a minority of the Senate, which has the power to block treaty agreements.

Moving to the domestic side, I think the same situation applies there. We are in great danger of the possibility of a very serious economic problem rising sometime in the not too distant future. One of the reasons is, the world is much more closely tied together, and what happens in many places in the world today can have the most serious effect, and very quickly, on our own economy. Our own economy at the moment is very fragile, not in a strong enough position to withstand some major economic problems arising elsewhere in the world.

Also I feel the problems here have become so complex that it is impossible to wait, as Professor Schlesinger seems to indicate he would like to wait, until there arises some sort of magical consensus among the people as to what should be done about it. I don't think that consensus will ever arise.

We did face, domestically, a somewhat similar situation, when it was not complicated to the same extent by the situation elsewhere in the world, at the time when Franklin Roosevelt, President Roosevelt, took office. At that time there was no consensus as to what should be done. President Roosevelt had run on a platform. He made certain statements as to what he was going to do. When he got into office, the situation was so serious that these were all forgotten and a totally new set of proposals was put forth, and there was consensus not on the proposals—nobody understood them really and what their result would be—but there was consensus that action was necessary. We were in a crisis, and the country yearned for some sort of action, some sort of leadership.

The Congress responded to that and made itself into an effective body to enact the Presidential program. That was dubbed the "Rubber Stamp Congress." It was an effective Congress, and maybe that is what we need in time of crisis. But I am a little skeptical of the wisdom of waiting and sort of inviting this sort of a crisis before we function. I think there is very grave danger that we will find that the next time we have such a major crisis, we may not be able to find our way out of it and still preserve what is fundamental, which are our individual liberties in the United States. And it would be tragic to me, if we got ourselves in a situation where we lost these liberties, simply because we were unwilling to even consider any change in the structure of our Government, which might facilitate agreement in the adoption of proposals, action that would forestall such a crisis.

Thank you.

ARGUMENTS AGAINST CHANGE

Representative **Reuss**. Thank you. Mr. Schlesinger, let me start off by addressing myself to the point made. Mr. Schlesinger has pointed out that in the 19th century, the Nation endured the agonizing problem of slavery, yet emerged.

How do you answer the point that the Gordian knot of slavery was easier to resolve than the present Phillips curve of unemployment and inflation; that problems nowadays are more complex, both at home and in the world; and that a system which performed nobly in the past may not inevitably be what is needed today?

Mr. **Schlesinger**. I would concede to Mr. Dillon that nuclear weapons pose a problem of novelty and magnitude which exceeds any that this republic has faced. I'm not sure that the best way to deal with that problem, however, is to create a structure of government that makes ill-considered and precipitate action possible on the wish of the Executive.

Parliamentary government, one must understand, is a government in which, when the cabinet seeks legislation, it gets it. The only way it cannot get it until its term runs out is if enough members of its own party turn against it.

If we had had parliamentary government in this country, we would have had, for example, the court packing plan. We would have had, under the Reagan administration, pure supply side policy enacted, along with antiabortion legislation, school prayer legislation, and the other "social issues." Even in a rather small, compact, homogenous country like Great Britain, what Lord Hailsham called an "elective dictatorship" creates problems.

To have an elective dictatorship in a country of our size, with our ethnic and geographic diversity, would create most serious problems.

The argument for considered, as against ill-considered, action is particularly strong with regard to nuclear weapons. I would not wish the nuclear weapons policy of this country to be formulated by any government by edict, simply because it controls, by definition, the majority of the parliament.

I would add that the situation which Douglas Dillon described in 1933 in which Roosevelt got his early New Deal program through took place under the existing separation of powers.

IMPROVE OUR SYSTEM WITH PARTS OF A PARLIAMENTARY SYSTEM

Representative **Reuss**. In a moment I want to involve the panel in this widespread dialog.

I would have one question of Mr. Schlesinger before that, however.

In your excellent prepared statement, Mr. Schlesinger, you point out that those who advocate adoption of the British parliamentary system neglect the fact that many thoughtful people have written, discerning many problems with that. Specifically, you say:

> British reformers yearn for the separation of powers. They want a formal written Bill of Rights. They have achieved standing parliamentary committees and wish now to increase the professional staffs and extend the powers of investigation and oversight. * * * They want to end designation of parliamentary candidates by the party organization in favor of open primaries. They want fixed elections at regular intervals.

Surely, there are these defects in the British system, and those voices within Britain that are calling for changes there.

What do you say, however, to proposals not for a total parliamentary system, but for some devices designed to buffer over what may be excessive checks, some devices to strengthen the party system, and some devices directed at producing accountability—which fall far short of the parliamentary system?

Specifically, what do you say to proposals made by some to retain our Presidential system, retaining our separation of powers, retaining our Bill of Rights, retaining our congressional committee system, retaining the open primary where States want it, retaining fixed elections at regular intervals, but providing basically two things: One, a situation where Members of the House and Senate could, under certain circumstances, without losing their seats, be members of the government and of the Cabinet; and second, where, say, once in a 4-year Presidential term, the President could, if he felt frustrated by the Congress, call an election in which he and the Congress would have to run again—and on the congressional side, a possible election once in a Presidential term where, as perhaps in the Watergate case, the Congress would vote no confidence in the President and thus call an election of the President and the Congress? Such a system would fall somewhere between our Presidential system and the parliamentary system. Direct yourself to that, because that's one of the things that's under discussion.

Mr. SCHLESINGER. The most organized effort to try to see whether devices from the parliamentary system could be added to our system while retaining the essence of the separation of powers was in Thomas K. Finletter's book of 1945, "Can Representative Government Do the Job?" It's a most ingenious, carefully argued effort to try to see what could be taken of value from the parliamentary system. Some of the devices you mention are discussed in that book.

I do not see major objections, in principle, to the appointment of Members of Congress to the Cabinet. There may be practical objections since it's already hard enough being a Member of Congress and hard enough being a Cabinet official, whether there are enough hours in the day to combine both, I don't know. In years past, Members of Congress have been given positions in the executive branch. Franklin Roosevelt made Senator Wagner the first chairman of what later became the National Labor Relations Board.

I'm more doubtful about provisions of dissolution of the Congress and new elections. I think the effect of this is to increase the power of the Executive, because I think the Executive threat of dissolution is something which, under parliamentary systems, the Prime Minister uses to great effect.

Our chief leading American student of British institutions, Prof. Samuel Beer, argued with reference to the proposed Reuss amendment, that the probable effect would be to increase executive power at the expense of Congress.

While I believe in the need for a strong Presidency, I do think the value for a strong President of having a strong and independent Congress is very considerable.

SHOULD THE CABINET INCLUDE MEMBERS OF CONGRESS?

Representative REUSS. You have just now expressed some modified support for the idea of permitting Members of the House and Senate to take part in the Government in the Cabinet. So, let's turn to that problem for a moment.

Senator Fulbright, you made quite an important point, I believe, that doing that would give more meaning to a congressional and senatorial career, that it would induce people to stay around, in the knowledge that at some time in the future they might occupy a Cabinet position or a shadow Cabinet position, and that would strengthen willingness of good men and women to stay in the legislative branch.

You also suggested that the absence of that opportunity may in some part be responsible for the devil finding work for idle hands to do. Certainly some of the excessive massaging of constituencies by Senators and Congressmen, some of the somewhat insincere excesses of the constituent questionnaire and the 25-second television reports to constituents, some of the excess independence of candidates from party loyalty, and the ability of special interest groups to detach a sheep from the flock—all of those perceived weaknesses of the present system might, in some measure, be alievated by giving Senators and Congressmen a greater participation in the high-level decisions of Government and thus provide the exhilaration that brought them into public life in the first place.

Is that a fair statement?

Mr. **Fulbright**. It is indeed. Not only staying here but gives the young and ambitious people the incentive to come here in the first place.

When you look at it now, the young man, who is really motivated to be public servant and is ambitious for influence and power, where does he go? He looks at Congress. Well, it's sort of a dead end that is no longer a particular advantage if he wants to be a member of the executive.

One of my friends said, "What would you advise your son who was ambitious? It is proper to go into the Congress?"

I said, "Well, it doesn't necessary lead—it may be better to be a good peanut farmer or something else that gives you the opportunity to be elected."

The unemployed have a much better opportunity, because it took 2 years—in the first election of President Carter. And if you had a job, it was difficult to take off 2 years to run for President, I mean, the election itself. I think it would be more attractive and also keep them.

I would like to observe just one or two things.

Professor Schlesinger has referred two or three times, he mentioned the court-packing plan.

It occurred to me occasionally maybe if the President had been a member of an effective Cabinet, members of which had their own political base, not just the kind of Cabinet we have now, in which they appoint people who have no political base at all—Cabinet members of a proper parliamentary system are virtually the peers of Prime Minister—he is only one among equals, virtual equals. And, you don't push them around—it occurred to me that even the proposal for a court-packing plan probably wouldn't have happened if we had a genuine Cabinet government. He would have had enough advice of his peers. That would have prevented it.

One of the points in George Reedy's book is that under the present Presidential system, after 6 months in the White House, they lose all touch with reality. There's nobody to tell them to go soak their heads. You remember that, it was very colorful—expressions of George Reedy. He observed a very powerful President firsthand. It impressed me very much.

The President, under our system now, completely loses touch with people of comparable influence and prestige. Whereas, in the parliamentary system, he is surrounded, first, by the Cabinet, most of whom also are, you might say, rivals. They are all important members of that parliament, and they can question—and do question, in my opinion—they are not separate from the body itself either, and they are subject to these question periods, to which there's nothing comparable in our system.

I would feel that the major virtue, it seems to me, of the parliamentary system is the prospect over time there would be a much stronger, more effective body of men, because it would attract such men. And I don't think that this is likely to happen unless we gave an opportunity for people to want to come into the Congress.

If I'm not mistaken—I didn't look this up, but I think I saw recently that, under late polls, the Congress rated the very lowest of all the important institutions in the country in the approval of the public; is that not correct? Do you remember that?

Representative **Reuss**. Yes, somewhere.

Mr. **Fulbright**. It seems to me somewhere around 19 or 20 percent is all of the public, whatever there were—I'm not a great advocate of polls—anyway, they reflect a certain attitude and lots of people use them.

Congress, as a body, is not a very popular institution, which means a young man, an ambitious young talented man, he looks at this—does he have an incentive to go into politics and to be a Member of Congress? I don't think it's a very encouraging prospect.

They used to make fun of it. I used to teach in the law school. I know we used to argue about it. Well, no honest man would run for politics. I got into trouble by advocating to my students they ought to do it. Then, one of them was elected. He said—you used to say, "You ought to go into politics. Now is your opportunity to try."

But it isn't a place that has very high esteem in the public mind.

I think it would have that effect.

IMPROVE EDUCATION

One last thing that also occurred to me. I didn't intend to do it, but I would like to offer to the committee for its record an article about the Japanese. And this is my last point. The Japanese, as we all know, have been and are very successful in competing with us in areas in which we recently thought we were preeminent, in the field of automobiles, steel—now technology, and so on.

This article—the reason I think it's regrettable is that the great success of the Japanese is the effectiveness of their education system. I submit it is just as relevant to politics, for government, as it is to business.

This happens to be published by an investment bank. But I am quite firm in my own mind it applies just as well to government.

Representative Reuss. Without objection, the article will be received in the hearing record at this point.

[The article referred to follows:]

Economic Perspectives

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> *Just so far as education can render a nation intelligent and virtuous, so far is it relieving the rulers from the more painful exercises of power. The nations which have in modern times exerted the greatest influence on the world's history, those which have made the most rapid progress in wealth and power, are those which have made education their special care, and have furnished the most general and the most thorough culture to their citizens. The nation which proposes, therefore, to develop its resources, must begin by providing for its young men the necessary education. . . . It must be able to train up a future army of engineers, navigators, ship-builders, architects, iron-masters, and manufacturers, who shall do for their country what the Watts, the Stephensons have done for England, and what the Fultons, the Franklins have done for the United States. . . .*
>
> *For Japan this branch of the subject has most profound interest. Rich in all agricultural and mineral resources, it presents a boundless field for the applications of modern technological science. Standing as the conspicuous advance guard of the Eastern world, it has unrivaled facilities for founding and developing a great system of industries, which will render it as eminent in national wealth as it is already eminent in a spirit of political progress. . . . Japan, in respect to the Asiatic continent and the western coast of America, holds a position almost identical to that of England in respect to the European continent and the eastern coast of America. It requires but the introduction of the modern appliances of commerce and the judicious encouragement of the Government to create out of Japan an equally colossal commercial power.*

These passages, from a memorandum submitted to the Japanese Government by Prof. David Murray of Rutgers University on March 7, 1872, have proved to be remarkably prophetic. In this year of deep recession — 110 years later — businessmen and investors are eagerly devouring books and magazine articles on the secrets of Japan's economic success. Indeed, the impact of Japan's economic development and cultural penetration are seen on every hand: from Sony to Pac-Man, from Komatsu to Fanuc, and from "Shogun" to *sushi*. The fact that this is happening in the midst of the worst recession since the Great Depression, however, underlines the danger that the whole world may be swept into an era of mutually destructive trade wars and beggar-thy-neighbor policies.

Japanese Economic Power Stems From Education

Against this background of cultural fascination and economic frustration, it is important to understand the true sources of Japan's economic ascendancy in the postwar period. Prof. Murray was not only prophetic in foreseeing Japan's economic success a century later but he also played a significant role in the early phase of that development. As a result of the memorandum cited above, Prof. Murray was appointed high counsellor to the Japanese Ministry of Education and served in that post from 1873 to 1878. Although the French and German models were also utilized in designing the modern Japanese educational system, the impact of American ideas has remained strong. During the U.S. occupation of Japan, the American influence became especially powerful, particularly in fostering ideas of equality of opportunity and egalitarianism within the educational system and in the society as a whole.

Most explanations of Japan's economic success have focused on such things as high rates of capital formation, importation of advanced technology, government-business cooperation ("Japan, Inc."), low defense burdens, and Confucian ethics. Although these and other factors have been important to a larger or lesser degree, they cannot explain why Japan has become such a powerful economic force. In our judgment, the most important single factor has been the one originally stressed by Prof. Murray in 1872. Just as he predicted, Japan has become "the great commercial nation of the East" by developing a highly effective educational system that has helped to produce the best-trained labor force in the world. Partly as a result of this meritocratic educational system, Japan has undergone a greater social transformation than any other country.

Superior Training in Science and Mathematics

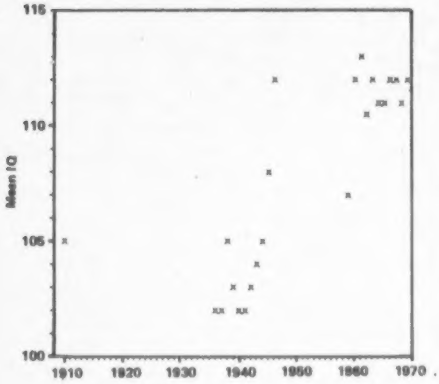
The success of Japanese industry — particularly in such fields as electronics — is largely attributable to the fact that the nation's educational system is producing young people who are better trained in science and mathematics than those of any other country. In a mathematics achievement test conducted among 13-year-olds in ten advanced countries, Japanese students recorded the highest mean scores. (U.S. students ranked ninth). In tests of science achievement conducted among 11-year-olds and 14-year-olds in seventeen countries, the Japanese showed the highest mean scores at both levels. One reason for the superior test results is the fact that Japanese schools offer a demanding curriculum and operate at least 240 days a year, compared with 180 days in the United States. Japanese schools also require much more training in mathematics and science than is customary in the United States.

On the question of Japanese education, even more startling evidence has been presented by Richard Lynn, a British psychologist at the New University of Ulster. In the May 20 issue of *Nature*, Prof. Lynn presented data derived from a series of tests indicating that "over the course of a generation the mean IQ in Japan has risen by 7 IQ points" and that the "overall mean performance IQ" is now 111 (relative to a mean American IQ of 100). Prof. Lynn reported that "the Japanese cohorts born earlier in the century (1910-45) have a mean IQ of 102-105, whereas those born from 1946 to 1969 have a mean of 108-115." Prof. Lynn makes the following observations about these findings:

> Other advanced Western nations, such as Britain, France, Belgium, Germany, Australia, and New Zealand, all have mean IQ's approximately the same as that in the United States. At 111, the mean IQ in Japan is the highest recorded for a national population by a considerable order of magnitude. The effects of the high Japanese IQ of 111 can be illustrated as follows. Whereas American and Europeans have 2% of their populations with IQ's over 130, the Japanese have 10% at this level. Among the population as a whole, 77% of Japanese have a higher IQ than the average American or European. Since intelligence is a determinant of economic success, the Japanese IQ advantage may have been a significant factor in Japan's outstandingly high rate of economic growth in the post-World War II period.

Not surprisingly, Prof. Lynn's findings have evoked a good deal of controversy. He attributes the rise in IQ scores largely to environmental factors rather than changes in the genetic structure of the population. Other observers have noted that Japanese students are so accustomed to taking examinations that they may be simply more adept at taking IQ tests. Improvements in nutrition, urbanization, the increasing outbreeding of the population as a result of migration, and exposure to Western culture are also cited as explanatory factors. Much of the improvement in IQ's may be traceable to the living conditions of Japanese households. Particularly in the postwar period, crowded housing conditions in urban areas have resulted in children being raised in close proximity to their parents, who themselves are increasingly better educated. To the extent that children have more

Mean IQs of Japanese Cohorts Showing a Secular Increase



Means and Coefficients of Variation for Scores on the International Science Achievement Test

	Primary School (about Age 11)		Middle School (about Age 14)	
	Mean	Coefficient of Variation	Mean	Coefficient of Variation
Japan	21.7	.355	31.2	.474
Australia	—	—	24.6	.545
Belgium (Flemish)	17.9	.489	21.2	.434
Belgium (French)	13.9	.511	15.4	.571
Chile	9.1	.945	9.2	.967
England	15.7	.541	21.3	.662
Federal Republic of Germany	14.9	.497	23.7	.485
Finland	17.5	.468	20.5	.517
Hungary	16.7	.479	29.1	.436
India	8.5	.976	7.6	1.184
Iran	4.1	1.317	7.8	.782
Italy	16.5	.521	18.5	.561
Netherlands	15.3	.497	17.8	.562
New Zealand	—	—	24.2	.533
Scotland	14.0	.600	21.4	.584
Sweden	18.3	.399	21.7	.539
Thailand	9.9	.657	15.6	.519
United States	17.7	.525	21.6	.537

Source: L. C. Comber and John P. Keeves, *Science Education in Nineteen Countries;* Table from William K. Cummings, *Education and Equality in Japan.*

interaction with their parents at an early age, they may be better trained and educable from their pre-school years on. As children grow older, they are subjected to intense educational pressures from their parents, relatives, and society as a whole.

Participatory Management Has Resulted from Increased Education

Whatever the explanation for the high scores recorded by Japanese students in IQ tests and in the fields of science and mathematics, these data suggest that Japanese industry has the benefit of a work force that is superbly trained in the basic disciplines and possesses a high capacity for learning. Because Japanese students undergo more training in science and mathematics than their American counterparts, they are better equipped to cope with the requirements of the new age of high technology. At the same time, it should be noted, the improvements in education may provide much of the explanation for the perceived superiority of Japanese management practices. Indeed, it is hard to understand one without the other. In his book, *Education and Equality in Japan,* William K. Cummings notes that the postwar school system has been animated by a spirit of egalitarianism and meritocracy. As the products of this system have entered the labor force, they have helped to transform Japanese management toward increased emphasis on participatory practices and worker responsibility. The egalitarian emphasis is evidenced in the fact that top corporate executives are currently paid only about 7½ times as much as newly entering recruits of Japanese companies. Before World War II, top executives were paid about 70 times as much as new entrants. The egalitarian emphasis is also evident in the distribution of income: OECD figures show that the bottom 20% of families receive 7.9% of total after-tax incomes in Japan, compared with only 4.5% in the United States.

The emphasis on egalitarianism and participatory management shows up rather vividly in the way that the use of quality control circles developed in Japan. The basic ideas of statistical quality control were introduced to Japan by two American professors, W. Edwards Deming beginning in 1948 and J.N.

Juran in 1954. As recounted by Prof. Robert E. Cole in his book *Work, Mobility and Participation*, these ideas were transmuted into a more egalitarian form in Japan:

> From 1955 through 1960, these ideas spread rapidly in major firms, but with an important innovation on the part of the Japanese. In the Japanese reinterpretation, each and every person in the organizational hierarchy, from top management to rank-and-file employees, received exposure to statistical quality-control knowledge and techniques, and they jointly participated in study groups, upgrading quality-control practices. This is at the same time both a simple and a most profound twist to the original ideas propagated by American experts. Quality control shifted from being the prerogative of the minority of engineers with limited shop experience ("outsiders") to being the responsibility of each employee. Instead of additional layers of inspectors and reliability assurance personnel when quality problems arise, as is customary in many U.S. firms, each worker, in concert with his or her workmates, is expected to take responsibility for solving quality problems. This is in contrast to many American firms, where the general rule of thumb is that you do not have workers inspect their own work; implicit here is a basic lack of confidence and trust. . . .

A New Form of Peoples' Capitalism

What all this suggests is that the Japanese have succeeded in creating a new form of "peoples' capitalism," one in which tremendous emphasis has been placed on improving the quality of the labor force through education and then giving workers more respect and greater responsibility through participatory management techniques. This is the basic reason why Japan has become such a formidable competitor in International markets. To deal with a work force that is increasingly better educated, Japanese firms have evolved participatory management systems that evoke the willing cooperation of employees while tapping each person's store of knowledge to improve quality, lower costs, and heighten productivity. As American observers have noted, these innovations largely reflect the pervasive egalitarian sentiment that has been inculcated in the work force by the educational system.

Thus, the competitive strength shown by the Japanese economy is solidly based on a fundamental improvement in the quality of the population through education and on the development of new systems of participatory management. As a result, the Japanese can be expected to remain formidable competitors — particularly in the high technology industries — far into the next century. During the past several years, many American companies — including General Motors, Westinghouse, and General Electric — have been actively studying Japanese management methods in search of ideas to improve their own performances. In our judgment, however, there are even greater lessons to be learned from the Japanese example on the national level. Now that the main arena of international competition has shifted to the Pacific Basin, the United States cannot afford to simply recycle old ideas or to retreat into protectionism. Just as American educators played key roles in imparting new ideas that were adapted by the Japanese in developing their own educational and management systems, the United States may now benefit from the lessons derived from Japan's experience in building a new type of high-growth economic system.

Sam I. Nakagama

Mr. **Fulbright**. In it, it has extremely interesting statistics about the level of education in the United States and Japan. That is fundamental.

I agree with Dr. Schlesinger when he says no system is going to work very well if the electorate and the participants are not sufficiently educated to understand the purposes and objectives of that operation. If they are motivated solely by these special interests and local interests, and they are unable to project their interests beyond their parochial interests—it won't work.

The parliamentary system is no panacea, goodness knows. It's not going to overcome ignorance of the popluation.

I go back to Mr. Jefferson. He didn't think it would work either if you didn't give first priority to education. And that is the area in which we have departed more than any other area from Mr. Jefferson's advice, because I don't think there's any question that our public education in this country is inferior to many of our competitors on the international scene.

My final point is it leads to competition between us and other countries, which we were not exposed to, really, until after World War II. That is the central issue that makes it at least relevant and necessary to examine whether or not our political system is any more competitive than our automobiles in the international scene, because we now are up against foreign competition which we were not up against prior to the recent periods.

So, I think it is sufficiently serious to warrant at least a discussion.

And certainly I am all for these hearings, that we ought to discuss and have some feeling about what might be done. If this crisis that Mr. Dillon talked about should develop, it would be a crisis—if it does arise, a need for a change, we ought to know how to change it. So, it's a very worthwhile undertaking.

I again commend the chairman for doing this.

Thank you very much.

Representative **Reuss**. Thank you very much, Mr. Fulbright.

Mr. Schlesinger, did you want to respond?

Mr. **Schlesinger**. I agree with much that Senator Fulbright has said. The question is the extent to which the Cabinet is necessarily a restraining influence. It might well have been that the Cabinet might have persuaded FDR not to try to pack the Court. On the other hand, after FDR had carried 46 out of 48 States the year before, the cabinet might well have deferred to him. When one considers England, where the tradition of cabinet government is well established, the cabinet did not restrain Anthony Eden from the Suez adventure. Indeed, it was not formally consulted about that adventure. In other circumstances consultation with the cabinet has been less than complete.

SEPARATION OF POWERS—WHO IS RESPONSIBLE?

Representative **Reuss**. Let me ask you a related question, Mr. Schlesinger. You said earlier that if we had had a parliamentary system here under President Reagan, his economic program would have been enshrined by the whole government because the Congress obviously would have gone along with his government.

Well, isn't it a fact that, despite the absence of a parliamentary system, the Congress did go along with the Reagan economic program, enacted the budget, enacted the tax program; and isn't it further a fact that, despite that almost blind acquiescence by the Congress, President Reagan has been saying the reason it didn't work is that Congress didn't give him exactly what he wanted—an assertion which, of course, would not have been possible under a parliamentary system?

How would you respond to that?

Mr. SCHLESINGER. I agree with your point. It seems to me to suggest that the separation of power is not a necessary obstacle to a President getting his program through.

As for Presidents blaming Congress, this is regarded, I would say, throughout the country as an alibi for failure, not as a conclusive reason. Alibis are a common resort for politicians—and, indeed, for professors.

So that I don't think that you make a major change in the system in order to remove the alibi. If there is not one alibi, there is another.

Of course, Congress has always been held in low esteem. It is not a situation of the present. One remembers in the latter part of the 19th century, when Congress was as nearly disciplined and effective as it ever was, when Wilson wrote a book entitled "Congressional Government," it was then Mark Twain made his famous remark, "Reader, suppose you were an idiot. And suppose you were a Member of Congress. But I repeat myself." [Laughter.]

CAMPAIGN FINANCING—CAN WE LIMIT SPENDING?

Representative REUSS. Mr. Scott, I was delighted to hear, among many other fine things in your testimony, your observations on the Supreme Court case of *Buckley* v. *Valeo,* 1976, which held that for all practical purposes Congress may not constitutionally put any limitation on the total amount to be spent in a campaign for the House or the Senate.

So in this last election, we have had in case after case a candidate of both parties for a 2-year congressional seat that pays $60,000 a year spending $1 million or more to assure that seat.

I agree with you about that decision. I think it potentially as dangerous as the Dred Scott decision of a century and 20 years earlier proved to be.

Is it your feeling in your criticism of that decision, that it carries the sacred right of freedom of speech too far, that freedom of speech is a right which has to be tempered by justice, and that just as a legislature may constitutionally stop someone from shouting "Fire" in a crowded theater, the Congress ought to be constitutionally able to stop the degradation of the democratic process by unlimited campaign spending?

Mr. SCOTT. Yes, sir. As has been said, the Supreme Court follows the election returns, and I would say not soon enough. It may take them a long time to rectify the consequences of their collective folly.

Meanwhile, Congress has some advantages. It can, of course, provide for public financing and penalize those people who exceed certain limitations by denying them or, the alternative, providing that funding for the challengers.

It may not be an altogether satisfactory solution. We all seem to be a little reluctant to suggest constitutional amendments. It may be that a formula can be found which will pass the scrutiny now that the Court certainly is aware of the consequences of its largess.

I would like to comment on one other thing. My concern as to the parliamentary form of government for us rests in part upon the fact that I believe parliamentary government to be more sensitive to the transitory imprint or impress of public opinion.

And I would cite, for example, the nuclear freeze resolutions before various States. Some people may think that is good. Some may think it is very bad. But it is currently more popular in this country than miniature golf or mahjong or other things used to be.

Under the parliamentary system it seems to me that a nuclear freeze amendment, which might prove to be irreversible or irrevocable later, could be enacted under that system, under pressure from the London Times, for example.

Here we operate with regard to the thunder of the New York Times in the morning, filtered by nightfall through CBS, and then more slowly to the Congress.

So that I do think it would take a longer time to enact something of this sort, which could have enormously dangerous consequences, in my opinion, on the foreign policy of the United States.

As to the reference to George Reedy's somber alternative of chaos or suppression of dissent, I don't foresee this country coming to that short of a nuclear holocaust. I don't see it, but my own answer would be better neither than either, which the Germans render even better, "besser kein's als eins."

Representative **Reuss**. Thank you for your observations on both points.

On the campaign expenditure point, I, like you, have supported the idea of Federal funding for congressional elections as something that could constitutionally be done, and I voted for it.

I have difficulty with it, however, in that it is a little unfair to ask the taxpayers to pick up the check and match, in potentially 535 races, what the special interests can put in on the other side. So that it would be a much preferable solution to have some overall limits.

Mr. **Scott**. Well, we know—and this, of course, was originally suggested by Theodore Roosevelt about 1904—the public financing of Presidential elections—we know that it only costs a pittance really, a dollar here, a dollar for your wife. That is the lowest price on a wife I ever heard quoted. But it wouldn't cost more than a couple of additional dollars to finance this, per taxpayer per year.

Representative **Reuss**. Nationally, of course.

Mr. **Scott**. Nationally.

COULD ECONOMIC PROBLEMS IMPERIL OUR DEMOCRATIC INSTITUTIONS?

Representative **Reuss**. I am grateful for your answer. The sharp division between our witnesses continues. It is good for the course of future debate if thoughtful people can clash as decisively as you have.

I wonder, however, if there isn't agreement on one proposition. Mr. Schlesinger, Mr. Richardson, and Mr. Scott, while they oppose much tinkering or tampering with our present system, have agreed that economically we have problems so severe that, if not resolved in the end, they would threaten democracy.

Mr. Schlesinger puts it well when he says in his statement, "Unless we come up with better answers than we have found so far, our troubles will deepen, and so will the threat to our democratic institutions. The search for remedy is a matter of extreme urgency."

Would you all agree—and, remember, this is the Joint Economic Committee—that regardless of whether changes in our political structure make the solution of our economic problems easier, nevertheless we have economic problems of a very severe nature and, if blithely disregarded, they could indeed lead to the unthinkable; namely, peril to our democratic institutions?

That is the somber conclusion of at least one of the witnesses.

Is there any one of you who disagrees with that?

Mr. SCHLESINGER. No; I think that is right. The one thing that is going to engage the faith, the confidence of the people in our society is the sense that they have that they can make an adequate living for themselves and for their children. When that disappears, the whole Pandora's box of political desperation opens, and that is going to be very tough.

Representative REUSS. I will just ask the other witnesses if they agree. Senator Fulbright.

Mr. FULBRIGHT. Yes; I do. I don't know any easier answer to it except to come back to a point I have already made. It seems to me the process for having a more discriminating government under the other system is better. They would serve the answer. The present legislators don't know what to do.

The point is we have to get people in who know what to do. There are a few of them who know what to do, but they don't know how to get it enacted. I think there is always a voice or two around, and I think we have to increase the number of voices.

But I agree with that. I think it is more likely.

I don't wish to leave the impression that I think the parliamentary is a panacea. It is not at all. All I can say is I think it would improve our chances to preserve a working democracy—is about all I can say. It is a little better system, but not a complete answer. They make mistakes, too.

I think it is a little unusual, although we are a special country, that no other country with a democratic system has followed our example. All the others, with more or less small modifications, are parliamentary systems. Not that that is the only answer, maybe we are unique.

But our system requires a very high degree of education to function, and we certainly haven't reached that. And in this present situation, to me, with my innocence, the vast expenditures for armaments which arise from a parochial paranoia is one of the principal reasons for our deficit, our unemployment, our high interest—the whole dislocation in the economy.

I noticed in this morning's paper the Government is proposing to spend $259—I believe it was—or $249 billion on armaments in 1 year. It seems an absurdity, an insanity. I can remember when we were very proud in the first year of Lyndon Johnson to keep the whole budget for everything under $100 billion. It has gotten so ridiculous now under inflation, so bad it is all out of proportion.

The accepted figure is now the world spends $500 billion on armaments and its related issues. If that is not an insanity with nuclear weapons, I don't know what is, and something ought to be done about it.

I regret I don't have any easy answer, but education and a little more efficient system is all I can come up with.

Representative **Reuss**. Elliot Richardson.

Mr. **Richardson**. Mr. Chairman, may I begin first by saying yes, I do join in a concern—you recognized it as a common denominator of our points of view—with respect to what the potential consequences are of prolonged economic crisis. My main point, however, is that the capacity of a modern society, under whatever structure, to achieve effective attacks on its most serious problems depends upon the ability to achieve consensus. Leadership plays a necessary role in that process.

If we have effective leadership, it reaches out toward public opinion, contributes to the generation of a debate in which the Congress itself also participates, but it provides, at the same time, the feedback to the President whereby he can gage the popular support for his proposals, adapt them as may be necessary in order to broaden the base of their support, and progressively contribute to the building and reinforcement of the consensus.

This, it seems to me, is the only possible basis for dealing with the kinds of problems that Douglas Dillon referred to earlier. I would agree that the consequences of potential global war today are, on their face, more serious than they have ever been before. Part of the problem is that such vast destruction can occur so quickly, but the thought that somehow we could respond more intelligently to that kind of threat through increasing the power of the President, or through adopting the parliamentary system or the like, seems to me illusory. While it may be true, as Senator Fulbright has emphasized, that other countries have not adopted the American Constitution system lock, stock, and barrel, it is also true that no other government as a government has performed better than we have during the same period, or is performing better now.

If Japan is doing better as a matter of economic internal policy, it is because there do exist mechanisms for the achievement of consensus in the Japanese society that are more effective than the ones we have in a far more heterogeneous society. And so we need to keep our focus on the processes which interrelate the formulation of effective and persuasive approaches to the solution of problems with the achievement of the public and legislative support necessary to their fulfillment, and that no amount of tinkering can be a substitute for that process, and no other mechanism I know of can achieve it any better.

The British system, I would agree with Senator Fulbright, is very attractive in many respects from the standpoint of a political careerist like myself, and up until lately, I would have enjoyed very much the opportunity to be a part of that system as it existed in the great days of Britain, but if you look at the record, British economic performance in the last generation or so is conspicuous for the fact that it is the worst of any of the advanced industrial countries. Great Britain was, after World War II, among the highest in per capita income; now, among the major Western industrial countries, it is the lowest. Japan passed Britain in per capita income about 6 or 8 years ago.

Finally, Mr. Chairman, I would say, as to the esteem in which we politicians are held, we are not alone in disesteem. I seem to have occupied at least two other roles that are competitors in this regard: that of bureaucrat and that of lawyer. I am not sure that a parliamentary system would attract stronger and better men. I'm not sure that it does so in other governments.

And I would also just add that I think Senator Fulbright underrates the achievements of American education. Not only do we have a far higher proportion of our population going on to education beyond high school, but we also, whatever may be the shortcomings of some of the institutions they attend, we also have the world's most respected educational institutions. And an indication of their quality is the fact that they are the magnet for attendance by people from all over the world, hundreds of thousands of them. And so therefore, while I can agree on the diagnoses of the problems we face and the degree of their seriousness, I do not find persuasive most of the prescriptions insofar as they contemplate any major restructuring of our system.

Thank you.

Representative Reuss. Hugh Scott.

Mr. Scott. I think I expressed myself pretty well, at least if not well, adequately.

Representative Reuss. Dick Strout.

Mr. Strout. I would like to make one contribution here. While it does not necessarily mean moving to the whole parliamentary system, but to a whole lot of items in our present Presidential system that might well be changed, the one that I would like to have in the record, my favorite amendment would be one which would make it easier, I think, to conduct foreign affairs. I think it's undemocratic to have a constitutional system whereby the Senate can defeat a treaty. Senator Scott said very few things, on the whole, have been hindered by our system. But when I came here, we had just defeated the League of Nations. We also—at the present time—have SALT II that has been held up. I cannot see why 34 Senators in a legislative body of some 500 should have veto power over a treaty, and it is just that. I mention this as one illuminating article that we could debate about and discuss, but it isn't moving completely over to the parliamentary system. It's an examination of the system that we have at the present time.

Representative Reuss. Thank you, Mr. Strout, and all members of the panel. Your record will serve the cause of public discussion and education well. So thanks to all.

We now stand in recess until tomorrow morning at 10 in this place, where we will continue our hearings.

[Whereupon, at 12:15 p.m., the committee recessed, to reconvene at 10 a.m., Thursday, November 18, 1982.]

POLITICAL ECONOMY AND CONSTITUTIONAL REFORM

THURSDAY, NOVEMBER 18, 1982

CONGRESS OF THE UNITED STATES,
JOINT ECONOMIC COMMITTEE,
Washington, D.C.

The committee met, pursuant to recess, at 10 a.m., in room 2128, Rayburn House Office Building, Hon. Henry S. Reuss (chairman of the committee) presiding.

Present: Representative Reuss.

Also present: James K. Galbraith, executive director; Louis C. Krauthoff II, assistant director; and William R. Buechner and Chris Frenze, professional staff members.

OPENING STATEMENT OF REPRESENTATIVE REUSS, CHAIRMAN

Representative REUSS. Good morning. The Joint Economic Committee will be in session for its further hearings on the question of the political economy.

This is the third in what I think is a memorable set of hearings. The central questions explored are: Whether our Government, as now arranged, is able adequately to address the critical problems of the economy—employment and unemployment, inflation and price stability, growth and no growth, and the international economy; and whether, second, the state of the economy and its progressive deterioration in the years ahead in terms of unemployment, in terms of inflation, and in terms of a worsening distribution of income and wealth, might threaten our democratic form of government.

This morning, our agenda was to include four distinguished thinkers on the subject: James MacGregor Burns, Woodrow Wilson professor of government, Williams College; Henry Steele Commager, John Simpson lecturer in history at Amherst; Ferdinand A. Hermens, research professor, the American University; and James Sundquist, senior fellow, the Brookings Institution.

I had hoped that Mr. Commager could be here, but plane schedules in rural Massachusetts are now such that it is very difficult, if not impossible, for him to meet both his teaching schedule and his wish to be with us this morning. So we won't have the pleasure of the company of this great American.

To my regret, he has just been in touch with me, but we do have his prepared statement, which is a noble statement indeed, and is hereby included in full in the record.

[The prepared statement of Mr. Commager follows:]

PREPARED STATEMENT OF HENRY STEELE COMMAGER, JOHN SIMPSON LECTURER IN HISTORY, AMHERST COLLEGE, AMHERST, MASS.

The structure of our Government and of our constitutional system: Can it be adapted to the realities of politics and economics

It was the philosopher Alfred North Whitehead who observed that only once in the whole of modern history did an assembly of men faced with a major political or national problem solve it as well as could even be imagined. That was in the Federal Convention of 1787; it was Thomas Jefferson who characterized the members of that Convention as "an assemblage of demigods." So they seem to us now. Their achievements, then and in later years, cannot but fill us today with awe They did indeed bring forth a new nation---the first time men had ever deliberately done that. They invented the Constitutional Convention as a method of state making and of legalized revolution; they adopted the principle of Separation of Powers; and they inaugurated Judicial Review. They provided for the first elective Head of State, fashioned the first successful Federal System, and invented the first modern political parties (what had existed before were Factions.) They ended Colonialism by substituting the principle of the co-ordinate State for that of Empire or Colony. More successfully than any previous---and probably any subsequent---generation they reconciled nationalism and localism, and the claims of Liberty with the requirements of Order.

The nation they created flourished for some seventy years. It was threatened and torn apart by particularism dedicated to maintaining slavery rather than liberty. It survived that challenge and survived subsequent challenges, first on the domestic scene, and then on the global.

The major challeng in the domestic arena was that set forth so eloquently by President Wilson in his First Inaugural Address; and because it is so prophetic, I quote it at some length.

> We have squandered a great part of what we might have used, and have not stopped to conserve the exceeding bounty of nature without which our genius for enterprise would have been worthless and impotent, scorning to be careful, shamefully prodigal as well as admirably efficient. We have been

> proud of our industrial achievements, but we have not hitherto stopped thoughtfully enough to count the human cost, the cost of lives snuffed out, of energies over-taxed and broken, the fearful physical and spirtual cost to the men and women and childred upon whom the dead weight and burden of it all has fallen pitilessly the long years through. The groans and agony of it all had not yet reached our ears, the solemn, moving undertones of our life coming up out of the mines and factories and out of every home where the struggle had its intimate and familiar seat... The great Government we loved has too often been made use of for private and selfish purposes, and those who used it had forgotten the people...We remembered well that we had set up a policy meant to serve the humblest as well as the most powerful, with an eye single to the standards of justice and fair play. But we were very headless and in a hurry to be great.

That crisis came to a head in the Great Depression; we overcame it and---it was believed---banished it from our history during the New Deal.

The Global challenge was even more formidable, but that too we survived and so, we thought, set on the road to extinction---first, by victory in three quarters of the globe; then, by the United Nations and what Winston Churchill called "the most unsordid act in history," the Marshall Plan.

Then the clouds drew over the bright horizons. We entered,or were drawn into, the Cold War, and the cost of that---materially, scientifically, intellectually, even morally---challenged our traditions, our resources, our leadership, our energies, and to a large degree our hopes and our faith. The shift, abrupt as history goes, from isolation to global power, from self-sufficiency to imperialism, and from traditonal technology in industry and in business (even more, in the military) as well as equally profound shifts in social and psychological, in religious and moral areas, appeared to have induced a loss of confidence and something of a failure of nerve, and a drying up of that political and social inventiveness which had characterized us for almost two centuries.

These and other changes threatened and portended a breakdown of traditional political and constitutional mechanisms. These made clear, or should have made clear, that none of the major problems which glare upon us from the Atlantic to the Pacific can be solved by, or within, the States, but only by the nation; and that few of those more portenous problems which glare upon us from abroad can be solved by any one nation,but only by international cooperation. What this forecasts is at once the obselescence of traditional federalism and of traditional nationalism. To compound our confusion these developments come at a time when particularism enjoys a new wave of popularity and nationalism is more ardent and more aggressive than at any time in the past century.

It is this combination of challenge to our traditional institutions, to our traditional habits of thought and of conduct, to the constitutionalism system itself that confronts us with the necessity of re-thinking all of these.

II

Well over a century ago that great political philosopher John Stuart Mill wrote

> When society requires to be rebuilt, there is no use in attempting to rebuild it on the same old plan. No great improvements in the lot of man are possible until a great change takes place in the fundamental constitution of their modes of thought.

To consider here fundamental changes in our modes of thought would necessitate ignoring those time limits which you have wisely set upon me. (I have made some gestures towards this elsewhere: "Outmoded Assumptions in Foreign-Policy," *Atlantic Monthly*, March 1982; and "On Virtue and Foreign Policy," *World View*, October 1982.) I submit to you instead changes of two kinds which might enable us more effectively to adapt "our traditional political and constitutional practices" to what John Marshall called " the exigencies of Union," present and future. These adaptations can be brought about (as all of our revolutions have been brought about) by peaceful, legal and constitutional means.

Some of these changes are structural and can be effected by law or, in some cases, by constitutional amendments. Others are qualitative, or philosophical, or perhaps just psychological, and would depend on the ability of Americans to abandon practices now already anachronistic and habits of thought deeply engrained.

Consider first some of the structural.

Most of our formal changes in the past have been in this category. Thus a series of Amendments having to do with the modes of electing a President: Art. XII, Art. XX, Art. XXII, Art. XXIII, Art. XXV; thus substantial parts of Art. XIV, XV, XVII; XIX; XXIV, XXII, and XXVI on voting---these both structural and substantive; and Articles XIV and XVI as clearly substantive. A great many others have been brought about simply by what we might call evolution. To mention the most significant is to call attention to the recognition of the Political Party, the acceptance of Judicial Review, the growth of Executive Priviledge, the development, chiefly in our own time, of a new quasi-govenment in the enormous authority conceded to the independent regulatory commissions ---all,by now, as much a part of our constitution as is parliamentary supremacy of the British constitution.

Let me suggest some further changes, structural for the most part, that might improve the election and the performance of Presidents.

First, and most urgent, a proposal that would apply to all branches of our government, state as well as national, but primarily to the national: take money out of politics. I need scarcely elaborate on anything so obvious, indeed so hachneyed, except to express my astonishment that the Congress has not yet been able, or willing, to deal frankly and effectively with a problem which threatens to undermine and subvert our democratic system. Certainly the Election Reform Act of 1974 has not proven effective: it is not a shield, but a sieve. The Constitution is, as we know, by no means clear on the power of the government in this area, but if the Power to Regulate Commerce clause has provided the basis for almost limitless power in the whole economy, there is no reason why the Authority to "regulate...Times and Manner of holding Elections for Senators and Representatives should not be interpreted to prevent the evils of corruption that now permeate our whole election process. Other civilized nations, such as Britain and the Scandinavian countries, do not permit the kind of financial malpractices now standard in American elections.

Second, drastically shorten national Presidential and Congressional elections, perhaps to the three weeks which the British and other Parliamentary systems maintain. It is a curious commentary on American ingenuity that while in the early years of the Republic, when distances were immense and national figures relatively few, elections were allotted some three or four months; now that we have television in almost every house in the land, and every major candidate can enter the living room every day, campaigns drag on for a year---or more. Short campaigns would have two great advantages: one they would give Presidents and other office holders more time to perform their duties undistracted by the imperatives of politics, and second by reducing costs. In this connection, we should arrange that all national networks (which can, of course, be regulated by the F.C.C. or by the Congress) be required to broadcast the speeches or debates of legitimate national candidates free.

Third, an alternative which deserves more attention than it has received of recent years, is the substitution of national elections by majorities or pluralities for the outmoded and undemocratic Electoral College, surely one of the most obvious anachronisms of the Constitution. This change would have the added advantage of distracting attention from otherwise unimportant small states---New Hampshire for example--and permitting a broader and less geographically oriented selection of candidates.

Fourth, a simple change in the provisions for the Presidential veto which would permit not only a general, but an item veto, would work wonders to free the President, and the country, from the kind of blackmail now practicied by Congressmen who insert highly improper riders into appropriation and other essential bills as the price of their vote. This provision was, it should be remembered, written into the Confederate Constition, and exists, in one form or another, in some of the State Constitutions.

Fifth, reinvigorate the Cabinet which, although unknown to the Constitution, dates from the Washington Administration, and which served not only Presidents but the nation well. As originally designed, heads of Departments were, when the President chose, advisers. Some Presidents---Jackson is conspicuous here---preferred outside advise, but on the whole, over the long arch of years, the American people knew pretty well who was responsible for running foreign affairs, the War Department, etc. Increasingly during the last few administrations neither the American people, nor for that matter, foreign governments, know who advises Presidents on the conduct of foreign affairs. The spectacle of the State Department, the Pentagon, and the National Security Council following different policies in the realms of foreign and defense policies may confuse foreign governments, but it appears to confuse our own government even more.

Turning to the matter of congressional efficiency, Congress does not need any significant structural changes to enable it to get on with the job. It can, if it wishes, protect itself from special interest groups by limiting, restricting or outlawing the use of money to influence Congressional elections; it can, if it sees fit, reform the committee system even more than it was reformed a decade ago. What is more important here, however, is that the Congress recover or reinvigorate some of those powers assigned to it in the Constitution---powers which it has let go by default.

First, it can reassert the original intention of the Constitution that it take an active, not a purely passive, part in the conduct of foreign affairs. "Advise and consent" is a term drawn from British constitutional practice. For two centuries whatever laws were enacted by the Parliament were, in theory, enacted by the Crown"with the advise and consent" of the Lords and the House.

Second, it can, if it will, take seriously the provision that all appropriations shall originate in the House instead of standing idly or supinely by while the budget is drawn up in the executive office, and while---as with the last budget---the Senate takes it over and writes it. Third, it should and can take seriously the provision of Article One, Sec. 9 that "No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law, and a regular Statement and Account of the Receipts and Expenditures of all Public Moneyshall be published from time to time." No statement whatsoever has ever been published of receipts or expenditures of the Central Intelligence Agency; and when a few years back the Church Committee attempted to obtain such a statement, the C.I.A. refused to give one.

Third, one constitutional change in the arrangements for election to the Congress would I think provide at once both wider and better choice of candidates. That is to remove the residential qualification for the Senate and possible for the House as well. The logic of the original provision---that in an era where distances were immense, travel onerous, and information inadequate, it was well that the Congressman should reside in the district which elected him. That logic is no longer valid. National television, newspapers, journals, and Congressional letters, afford every voter incomparably more information about his Congressmen than he had inthefirst half century of the Republic. Much is to be said for liberating voters from this artificial restriction on their choice. I shall not emphasize the current or recent situation, but how valuable it would be if a Senator Fulbright or a Senator Chruch or a Representative Brademas could still serve his nation; perhaps it is instructive to observe that the nation would not have been ill-served had Mr. Lincoln been able to serve the nation from a district in Indiana or Ohio after his defeat in Illinois. There is little logic in this restrictive provision today at a time when every Congressman should represent the whole people of the United States, not just particular segments of it. That iscertainly true of the Senate where, almost from the beginning of the Republic, men like John Quincy Adams, Henry Clay, Webster, Douglas, Seward and scores of others regarded themselves as servants of, and spokesmen for, the whole American people.

Leaving Congress, the Judiciary has served us well at almost every level and certainly at the highest Federal level. The problem here is to protect it from interference or intimidation, not to restrict or revise its functions. Something is to be said for enlarging the Supreme Court or diminishing its workload; something (but not much) for setting up an auxiliary court which might select those cases worthy of the attention of the highest court. Perhaps more worthy of consideration is the suggestion that we should not limit appointments to the highest Court to lawyers or those with legal training. Certainly nothing in the Constitution requires this. And, just as certainly, Supreme Court Justices today, with four highly qualified law clerks to do essential research, do not depend on long training or experience. On the whole, decisions in the Court are based not on legal erudition, but on philosophical insights and convictions. Would not the Court have profitted in the past by the appointment of a John Dewey, a Lester Ward, a Jane Addams, a Reinholdt Neibuhr, a Charles William Eliot, and so on?

If we turn to substance, rather than to structure or jurisdiction, the most urgent task of the Court is to persist in and enlarge that process inagurated by John Marshall, namely, to adapt the Constitution to the ever-changing necessities of our economy nd society and government. Here it is relevant to concentrate on one, and perhaps the most important, of the current challenges to our constitutional system which the Court can address. That is to give meaning and substance to the "equal protection" clause of the Fourteen Amendment---that clause whose potential for revolution, that is constitutional revolution, is almost limitless. During the Warren era the Court did assume the responsibility of applying the equal protection clause with boldness and wisdom; recently it seems rather to retreat from the high position which it had assumed.

If our federal system is to function as the Fathers of the Constitution envisioned it (see the Preamble) we must provide not only equal justice, but equal protection. There is a palpable absurdity in maintaining fifty different standards of justice and of protection in a single nation: that is something that can be found no where else on a comparable scale. Why should there be fifty different penal codes, fifty different welfare systems, fifty different educational standards? Are we one nation or fifty? "In war we are one nation, inpeace we are one nation," wrote Justice Marshall, but for practical purposes that is not so. Thus in World War II, the Southern States had to reject some forty per cent of draftees as ineligible on either physical or mental grounds; in

Iowa and Minnesota the rate was less than two percent. Does any State have the right so to neglect the education and health of its young as to place the burden of defense, and the larger burden of security, on more enlightened sister states?

There is one other aspect of the " equal protection" clause which has not yet received theconsideration it deserves, even from the courts. The Constitution requires "equal protection of the laws". Courts have traditionally interpreted this as meaning that all existing laws must be applied impartially. But suppose there are no laws? After all what the Constitution says is equal protection. Is there not an obligation on the part of States which evade their responsibilities towards "all persons" to provide such laws; if they fail to do so are they not remiss in fulfilling their constitutional duties?

III

It would be a grave mistake to suppose that the changes which I have proposed---even if all of them were to be adopted---would themselves revitalize, democratize, modernize or more more just our constitutional system. Salvation is not to be found in even the most wise and ingenious technical reform. That was the conclusion of that greatest of all observers of America, Alexis de Tocqueville, who concluded that with all its drawhacks the American was a "just" society and that "in its justice lies its greatness and its beauty." As for how a democratic society (and above all a society which confessed slavery) was to maintain its dubious justice, he did not know,but concluded, somewhat ambiguously, that it must rely on religion and "enlightened self-interest."

I am not sure that we are capable of "enlightened self-interest" or that we understand it, asTocqueville did, to embrace the whole of the human race. But it is certain that the Founding Fathers were. They did not however rely soley on this, for they knew that it was at best a frail reed. They relied rather on their judgment, on their wisdom, their knowledge of History and Experience. These qualities they had and were able to apply. They knew,even in the flush of success, that they had created, in Franklin's famous words, "A

Republic, if you can keep it."

Can we govern ourselves? It is not irrelevant to remember that we were the first people in modern history who did govern themselves, and the first, too, who devised the mechanisms by which we could not only govern ourselves, but limit and control those who governed. Ours was, at the beginning, the most enlightened, the most mature, and the most inventive and innovative of all governments on the globe.

We are, then, confronted as the very threshold of this inquiry by some awkward questions. How did it happen that a people of less than one million voters, scattered along a limitless frontier in what was then a "third nation," and without those institutions of cities, universities, libraries, churches, academies, etc., which every Old World nation boasted, manage to achieve independence, write State and National constitutions, incorporate Bills of Rights, separate Church and State, create political parties, solve the problems of colonialism, subordinate the military to the civil power, set up far reaching school systems---the list is near endless---in a single generation? What a sobering fact that every major political and constitutional institution which we now boast was created before the year 1800 and not one has been created since. Or, if you want a more familiar comparison, we try to explain how a people, almost outside the bounds of Old World culture,somehow managed to elect for its first six Presidents, Washington, Adams, Jefferson, Madison, Monroe and John Quincy Adams, while our last six Presidents are Kennedy, Johnson, Nixon, Ford, Carter and Reagan. And if we turn away in some embarrassment from this comparison to the realm of political philosophy, how did ithappen that two young men in their thirties (with the aid of one old man in his forties) manage in eight months to toss off, as it were, 85 numbers of the Federalist Papers---incomparably the greatest classic of politics since Montesquieu, while a score graduate schools of political science, all richly endowed, with towering giants in the field, have not, and apparently cannot, produce anything remotely similar?

Have we run out of steam, as it were? Is democracy intellectually bankrupt, or paralyzed by its internal contradictions? Has democracy failed us? Has nationalism failed us?

That is not plausible. What ails us now is not a surplus of democracy, butlimitations on democracy. (I use the term here in the Tocquevillian sense of "equality." Our most urgent problems today are rooted not in any "tyranny of the majority" but in the threats of tyranny by minorities. They are rooted not in our committment to the objectives set forth in the preamble of the Constitution--a more perfect Union, Justice, domestic Tranquility, common defense, general welfare, and the blessings of liberty---all not only for ourselves but for posterity.

What we have,in the past generation or so, is not a repudiation of any of these ideals, but reluctance to support them. They are therefore in decline, and that decline neither inspires nor stimulates either support or resourcefulness. We are, to be sure, confronted with crowding crises. But when were we not confronted with crises? The crisis that confronted Washington and his colleagues was unprecedented in history: somehow they overcame it. The crisis that confronted Lincoln was incomparably moredire than anything we face today: somehow Lincoln and his followers survived it, saved the Union and ended slavery. The domestic crisis of the Great Depression, and the military crisis of the Second World War were far more formidalbe than anything we face today: ~~but~~ these, too, Franklin Roosevelt and his allies and associates surmounted. It is an indication of our failure of nerve, of our easy self-pity, that we stand constantly on the defensive, and take refuge not in the counsels of reasonableness and wisdom, or of experience, but of paranoia.

Along withthis goes an almost contumacious refusal to exploit powers and instruments at hand. I referred to that almost parenthetically in connection with our failure to control the abuse of money in elections. I referred to it in our fear of a judiciary prepared to perform its constitutional duties. It can be seen most dangerously in the attempt to repudiate or reverse the nationalism of Washington and Hamilton, of Marshall and Story, of Webster and Lincoln, and to repeal the verdict of Appomattox by going back to States Rights.

We cannot rethink our Constitution if we regard it as a Holy of Holies, above criticism and above amendment. We cannot effectively reconsider the more dangerous features of our economic system if we insist on comparing it only with the non, or anti, constitutional system of the Soviet Union. We cannot effectively reopen the issue which Hamilton raised as early as the 1780s when he said that "as of course all the minerals under the soil belongs to the people of the United States, and is to be disposed of for the common benefit of the people as the Congress may think best" we assume (as no other western nation does) that natural resources such as oil and gas belong to fortunate corporations rather than to the whole nation and to posterity. We cannot recover that civil religion which Franklin and Jefferson, and Adams and Madison took for granted if we persist in concentrating on private sin rather than public sin. We cannot effectively maintain the principle of the superiority of the civil to the military if we allow the needs of the Pentagon to take precedence over all human and social needs. In the political area we cannot exalt conservatism if we define it exclusively in economic terms, rather than---as with our greatest conservatives, Jefferson and Franklin Roosevelt---as the conservation of natural resources, the conservation of the dignity of all men, the conservation of that history which we call civilization for the benefit and happiness of posterity. And we cannot hope to excite criticism and inquiry, to stimulate inventiveness and resourcefulness and experimentation, to be as bold as were the Founding Fathers in all realms of politics, or to realize with Jefferson that History is prospective as well as retrospective, if the atmosphere of the Cold War disquises reality and discourages imagination.

Representative **Reuss**. I am now going to call on each of our witnesses in turn and ask them to present their views. The prepared statements and other papers presented by them will be received, without objection, in full, into the record.

Following their testimony, we will invite interchange among the members of the panels. I am sure I will have some questions to ask.

Mr. Sundquist, would you, as an old friend of this committee, start out?

STATEMENT OF JAMES L. SUNDQUIST, SENIOR FELLOW, THE BROOKINGS INSTITUTION, WASHINGTON, D.C.

Mr. **Sundquist**. Thank you, Mr. Chairman.

In June 1962, President Kennedy finally accepted the advice of his economic advisers that a drastic tax reduction was necessary to stimulate an economy that had been stagnating since the late 1950's, with a high cost in unemployment and lost production. The cut was finally enacted but only after an excruciating expenditure of political energy and 20 months of delay. During the same period, the British Government, facing the same circumstances, designed and passed a proportionately larger cut in a matter of a few weeks, without any noticeable fuss or tension.

PRESIDENTIAL AND PARLIAMENTARY GOVERNMENT COMPARED

Those coincident events dramatized the difference between the American system of government with its independent legislature and the parliamentary governments that prevail in most other countries. In parliamentary governments, once the executive branch decides on an economic policy, its adoption—with rare exceptions—becomes a routine matter. Action is taken promptly, and political responsibility is clearly fixed. In our Government, when the executive branch decides on an economic policy, that is only the first step in what is often an agonizingly long process. During that time, the Executive's recommendations may be twisted out of recognition by the legislative branch. And if, as Arthur Burns once said, the "first principle" of economic policy must be promptness in moving to counteract adverse trends that appear in the economy, then the delays inherent in the American policymaking process constantly violate that principle; by the time a measure is enacted it may be diametrically the wrong policy for the economic trends may have reversed themselves. Moreover, the prospect of conflict between the executive and legislative branches may discourage Presidents from even recommending measures that they feel are in the best interests of the country. Finally, responsibility for economic policy is so diffused between the branches that frequently neither the President nor the House or Senate majorities can be held clearly accountable politically for policy failures or given credit for successes.

On the face of it, the ability of a unified government like that of Britain to enact its policies quickly and without change has great appeal. Under those circumstances, it is—or should be—possible to establish a consistent and appropriate economic program and maintain it. Responsibility and accountability are clear. Economic policy can, in the phrase that seems to have gone out of style, be "fine-tuned," which is a hopeless goal in the ponderous American policymaking system. Yet the superiority of the parliamentary system in those regards depends heavily on one presupposition—that the executive branch economists and politicians are right, most of the time. For if they are wrong there is no check and balance in a legislative branch that, in our system, can impose its own corrective.

EXECUTIVE OFTEN WRONG ON ECONOMIC POLICY

From my own review of the record, I find it hard to conclude that, in the great conflicts over economic policy that have occurred between the executive and legislative branches in the United States in the postwar decades, the executive branch has been right most of the time. More often that not, the legislative branch has administered a useful corrective to administration policy. In 7 of the 10 major controversies over tax and spending policy between 1946 and 1976, the legislative came closer to being right than did the executive in my judgment, which in many of these cases reflects what seems to be the consensus of the economists who have analyzed postwar fiscal policy. The Congress was right usually because of blind luck rather than superior wisdom, but nevertheless it was right. The 10 cases are set out in the table attached to my prepared statement.

Others who review the record might reach a different judgment in the individual cases, of course, for appraising the correctness of a particular policy is to some extent a subjective undertaking. The criteria I used reflect a Keynesian viewpoint—that is, that taxes should be cut and spending increased when the economy dips into recession, and the opposite course should be taken when the economy becomes overheated and inflation is the problem. This approach seems appropriate because the Keynesian principles were accepted in general by administrations of both parties during the 30-year period, although toward the end of that period they began to lose ground.

In any case, no matter whether some may quarrel with the judgments in the table on individual cases, I doubt that anyone would contend that the Executive was right much more than half the time. On the basis of the record, congressional abdication in economic policy, which so many former executive officials implicitly see as the best solution to interbranch conflict, does not seem to be the answer.

WEAKNESSES OF CONGRESS IN ECONOMIC POLICY

On the other hand, the record also makes clear the inherent weakness of the Congress in setting economic policy. When the legislative branch was right, that was due more to its capacity to delay than to its capacity to innovate and initiate. The division of the Congress into two houses, its inevitable decentralization into numerous committees, its overload of work, the modern ethos of equality and individualism that prevents any leadership from taking charge in the same sense that the President is in command of the executive branch—all these characteristics make it difficult for the Congress to arrive at an integrated, internally consistent policy quickly as the basis for decisive action. The new budget process improves the institutional capacity of the Congress immeasurably in the field of fiscal policy, but that process—when it is exercised fully in order to achieve a truly coordinated policy, as in 1982—turns out to be such an inordinately time-consuming and tension-producing ordeal that one may question how long it can survive. And its scope extends only to fiscal policy; in other aspects of economic policy, the Congress has established no corresponding mechanisms. The field of energy policy, for instance, has been a debacle; when the Congress rejected President Carter's so-called National Energy Plan, it took the better part of 2 years to arrive at its own plan, and what emerged was piecemeal and uncoordinated.

LEGISLATIVE VETO

Therefore, in designing institutional solutions, we should seek devices that overcome the conspicuous weaknesses of the Congress—its difficulty in achieving internal coordination and in acting quickly—while preserving its capacity to correct the course laid out by the executive branch when that is necessary. The device that has been invented for just this purpose is the legislative veto, which has been applied in many fields in recent years but has been used longest and perhaps most successfully in the series of laws authorizing reorganization of the executive branch.

In the field of fiscal policy, using this approach, the President could be delegated authority to temporarily adjust tax rates upward or downward, within limits, to counter quickly either inflationary or recessionary trends in the economy. A legislative veto would appear to be a necessary feature of such a delegation for a very practical reason—it is hard to visualize the Congress making such a delegation without provision for a veto—and would be desirable in any case, to enable the Congress to keep a necessary check upon the President. Similar authority to curtail spending, subject to a veto, has already been delegated to the President in the Congressional Budget and Impoundment Control Act.

The legislative veto has proven to be so useful a practical device to facilitate the delegation to the executive of power that otherwise would not be delegated that, if the Supreme Court finds it unconstitutional in the cases now being adjudicated, the Congress would appear to have a responsibility to seriously consider initiating a constitutional amendment to make the device possible, perhaps limited to certain types of actions to cope with crises in economic and foreign policy.

Nevertheless, given our basic constitutional structure, there will always be conflict and deadlock between the executive and legislative branches, and at times in the future, as in the past the discord will become severe enough to debilitate the Government and render it incapable of coping decisively with emergencies, in both domestic and foreign affairs. It is at such times that one looks with envy—as President Kennedy did in 1963—at the unity of parliamentary governments and the decisiveness that that makes possible. Accordingly, more serious thought is now being given by more eminent and experienced people to the possibilities of fundamental constitutional reform than at any time since the crisis of the Great

Depression. I have prepared for another purpose a paper outlining the range of conceivable constitutional amendments that might serve to bring a greater degree of unity and harmony to the U.S. Government, and I submit an abbreviated version of that paper for the record.

If I were to select from the proposals listed in that paper the one that seems to combine best the elements of effectiveness and feasibility, it might be the one that is designed most directly to encourage control of the executive and legislative branches by the same party. If our system is prone to stalemate and deadlock when the President and the majorities of both Houses of Congress are of the same party, it is infinitely more so when control is divided.

Representative REUSS. Could I interrupt you a moment, Mr. Sundquist? Your subsidiary paper, "The Need for Bicentennial Review of the U.S. Constitutional System," is received in the record in full and will be printed in the hearing record following your prepared statement.

May I ask a question? You say it's an abbreviated version. I don't want to miss any good stuff you might have had. Does the abbreviation do that?

Mr. SUNDQUIST. What was left out was a series of amendments that do not bear directly on the question of separation of powers and deadlock between the branches. So for this purpose, it was somewhat irrelevant.

Representative REUSS. All right, thank you.

Mr. SUNDQUIST. In the very nature of healthy and democratic political competition between the parties, they must seek to develop partisan issues, not suppress them, and when the Government is divided those partisan issues inevitably erupt into contests between the President and the Congress.

Divided Government between the President and the House would be averted during the first 2 years of a Presidential term, except in rare circumstances, if candidates for each party's Presidential electors and for the House of Representatives were on the ballot as a combined slate subject to a single vote. That would eliminate ticket-splitting in voting for President and Representative, just as it is now impossible to split a ticket for President and Vice President. Senate candidates running in the Presidential year could also be included in the combined slate. If the electoral prospects of Presidential and legislative candidates were joined together, presumably relations between the President and his own party in the Congress would be closer and more accommodating. This change would be made even more effective by combining it with some alteration in the length of terms. One possibility would be a 4-year term for House Members coincident with the President term, as President Lyndon Johnson once proposed. Senators could be given 8-year terms, with half the members—one from each State—elected in the Presidental year on the joint ballot. Or the President could be given a 3-year term, Members of the House a 3-year term, and the Senate divided into two classes so that, again, half would be chosen in the Presidential year on the joint ballot. This would have the added advantage of extending the life of a Congress from 2 to 3 years, which would give it a longer time to handle its legislative load and give it 2 rather than only 1 year to concentrate on legislative matters before its Members had to suffer the distraction of the imminent campaign for reelection.

Whether or not this particular set of reforms is appealing, it seems clear that those who are concerned with the ineptness of the Government in recent years in coping with economic problems must look at the structure of our institutions. Voting one set of politicians out of office and another in may help somewhat, at times, but any group of leaders—however able and well-advised—sooner or later run up against an institutional structure that frustrates their ability to lead forcefully and govern wisely. And any serious examination of structural problems must lead ultimately to a reexamination of the Constitution itself, for the disharmony and diffusion of responsibility that characterize our system have their roots in the separation of powers principle that was established for the United States in the 18th century and remains unique among the advanced democratic countries of the world. The coming of the bicentennial celebration makes this period particularly timely for a careful reappraisal of our constitutional structure.

[The prepared statement of Mr. Sundquist, together with the paper entitled "The Need for a Bicentennial Review of the United States Constitutional System," follows:]

PREPARED STATEMENT OF JAMES L. SUNDQUIST*

In June of 1962, President Kennedy finally accepted the advice of his economic advisers that a drastic tax reduction was necessary to stimulate an economy that had been stagnating since the late 1950s, with a high cost in unemployment and lost production. The cut was finally enacted but only after an excruciating expenditure of political energy and twenty months of delay. During the same period, the British government, facing the same circumstances, designed and passed a proportionately larger cut in a matter of a few weeks, without any noticeable fuss or tension.

Those coincident events dramatized the difference between the American system of government with its independent legislature and the parliamentary governments that prevail in most other countries. In parliamentary governments, once the executive branch decides on an economic policy its adoption -- with rare exceptions -- becomes a routine matter. Action is taken promptly, and political responsibility is clearly fixed. In our government, when the executive branch decides on an economic policy, that is only the first step in what is often an agonizingly long process. During that time, the executive's recommendations may be twisted out of recognition by the legislative branch. And if, as Arthur Burns once said, the "first principle" of economic policy must be promptness in moving to counteract adverse trends that appear in the economy, then the delays inherent in the American policy-making process constantly violate that principle; by the time a measure is enacted it may be diametrically the wrong policy, for the economic trends may have reversed themselves. Moreover, the prospect of conflict between the executive and legislative branches may discourage presidents from even recommending measures that they feel are in the best interests of the country. Finally, responsibility for economic policy is so diffused between the branches that frequently neither the president nor the House or Senate majorities can be held clearly accountable politically for policy failures or given credit for successes.

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*The views expressed here are my own and should not be attributed to the Brookings Institution, its officers or trustees.

On the face of it, the ability of a unified government like that of Britain to enact its policies quickly and without change has great appeal. Under those circumstances, it is -- or should be -- possible to establish a consistent and appropriate economic program and maintain it. Responsibility and accountability are clear. Economic policy can, in the phrase that seems to have gone out of style, be "fine-tuned", which is a hopeless goal in the ponderous American policy-making system. Yet the superiority of the parliamentary system in those regards depends heavily on one presupposition -- that the executive branch economists and politicians are right, most of the time. For if they are wrong there is no check and balance in a legislative branch that, in our system, can impose its own corrective.

From my own review of the record, I find it hard to conclude that, in the great conflicts over economic policy that have occurred between the executive and legislative branches in the United States in the postwar decades, the executive branch has been right most of the time. More often than not, the legislative branch has administered a useful corrective to administration policy. In seven of the ten major controversies over tax and spending policy between 1946 and 1976, the legislature came closer to being right than did the executive in my judgment, which in many of these cases reflects what seems to be the consensus of the economists who have analyzed postwar fiscal policy. The Congress was right usually because of blind luck rather than superior wisdom, but nevertheless it was right. The ten cases are set out in the attached table.

Others who review the record might reach a different judgment in the individual cases, of course, for appraising the correctness of a particular policy is to some extent a subjective undertaking. The criteria I used reflect a Keynesian viewpoint -- that is, that taxes should be cut and spending increased when the economy dips into recession, and the opposite course should be taken when the economy becomes overheated and inflation is the problem. This approach seems appropriate because the Keynesian principles were accepted in general by administrations of both parties during the thirty-year period, although toward the end of that period they began to lose ground.

In the first five cases, covering the Truman and Eisenhower years, there is considerable agreement among economists who have subsequently reviewed the record that the executive branch tended consistently to fight the wrong battle, pushing anti-inflationary measures even when the economy was turning downward and pursuing restrictive policies during times of recession. The Congress, by pushing tax cuts and refusing tax increases, turned out to be prescribing better medicine -- if only by inadvertence. In most instances, I believe, the legislature's own main economic resource -- the Joint Economic Committee -- was on the side of the president and just as wrong as he.

Beginning in the 1960s, the executive branch began to look better. Everybody appears to agree, in retrospect, that the Kennedy tax cut proposal that was finally enacted in 1964 was just what the economy needed, and the long delay imposed by the Congress was detrimental. The same can be said for the tax surcharge that President Johnson proposed in 1967 and that was stalled for seventeen months in the Congress during a feud over spending cuts; and it is possible that Johnson would have proposed it somewhat sooner — and it was clear to his economic advisers that it was needed as early as 1965 or 1966 -- if he had not been discouraged by the prospect of a nasty, and perhaps a losing, battle with the Congress. But the legislative branch was evidently right in 1969 in imposing power on the president, over his objection, to institute price and wage controls, for he did use the power in his price-wage freeze of 1970. On the other hand it appears, in retrospect, that the Congress should have moved quicker to reduce spending as a counter-inflationary policy in the early 1970s, as President Nixon constantly urged. The last case in the table, the conflict between President Ford and the Congress over anti-recession policy in 1975, is more debatable, since the country was suffering from inflation and stagnation at the same time, but I give the nod to the legislative branch.

In any case, no matter whether some may quarrel with the judgments in the table on individual cases, I doubt that anyone would contend that the executive was right much more than half the time. On the basis of the record, Congressional abdication in economic policy, which so many former executive officials implicitly see as the best solution to interbranch conflict, does not seem to be the answer.

On the other hand, the record also makes clear the inherent weaknesses of the Congress in setting economic policy. When the legislative branch was right, that was due more to its capacity to delay than to its capacity to innovate and initiate. The division of the Congress into two houses, its inevitable decentralization into numerous committees, its overload of work, the modern ethos of equality and individualism that prevents any leadership from taking charge in the same sense that the President is in command of the executive branch -- all these characteristics make it difficult for the Congress to arrive at an integrated, internally consistent policy quickly as the basis for decisive action. The new budget process improves the institutional capacity of the Congress immeasurably in the field of fiscal policy, but that process -- when it is exercised fully in order to achieve a truly coordinated policy, as in 1982 -- turns out to be such an inordinately time-consuming and tension-producing ordeal that one may question how long it can survive. And its scope extends only to fiscal policy; in other aspects of economic policy, the Congress has established no corresponding mechanisms. The field of energy policy, for instance, has been a debacle; when the Congress rejected President Carter's so-called "National Energy Plan", it took the better part of two years to arrive at its own plan, and what emerged was piecemeal and uncoordinated.

Therefore, in designing institutional solutions, we should seek devices that overcome the conspicuous weaknesses of the Congress -- its difficulty in achieving internal coordination and in acting quickly -- while preserving its capacity to correct the course laid out by the executive branch when that is necessary. The device that has been invented for just this purpose is the legislative veto, which has been applied in many fields in recent years but has been used longest and perhaps most successfully in the series of laws authorizing reorganization of the executive branch.

In the field of fiscal policy, using this approach, the President could be delegated authority to temporarily adjust tax rates upward or downward, within limits, to counter quickly either inflationary or recessionary trends in the economy. A legislative veto would appear to be a necessary feature of such a delegation for a very practical reason -- it is hard to visualize the Congress making such a delegation without provision for a veto -- and would be desirable in any case, to enable the Congress to keep a necessary check upon the President. Similar authority to curtail spending, subject to a veto, has already been delegated to the President in the Congressional Budget and Impoundment Control Act.

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Nevertheless, given our basic Constitutional structure, there will always be conflict and deadlock between the executive and legislative branches, and at times in the future, as in the past, the discord will become severe enough to debilitate the government and render it incapable of coping decisively with emergencies, in both domestic and foreign affairs. It is at such times that one looks with envy -- as President Kennedy did in 1963 -- at the unity of parliamentary governments and the decisiveness that that makes possible. Accordingly, more serious thought is now being given by more eminent and experienced people to the possibilities of fundamental Constitutional reform than at any time since the crisis of the Great Depression. I have prepared for another purpose a paper outlining the range of conceivable Constitutional amendments that might serve to bring a greater degree of unity and harmony to the United States government, and I submit an abbreviated version of that paper for the record.

If I were to select from the proposals listed in that paper the one that seems to combine best the elements of effectiveness and feasibility, it might be the one that is designed most directly to encourage control of the executive and legislative branches by the same party. If our system is prone to stalemate and deadlock when the President and the majorities of both houses of Congress are of the same party, it is infinitely more so when control is divided. In the very nature of healthy and democratic political competition between the parties, they must seek to develop partisan issues, not suppress them, and when the government is divided those partisan issues inevitably erupt into contests between the President and the Congress.

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President and his own party in the Congress would be closer and more accommodating. This change could be made even more effective by combining it with some alteration in the length of terms. One possibility would be a four-year term for House members coincident with the presidential term, as President Lyndon Johnson once proposed. Senators could be given eight-year terms, with half the members — one from each state — elected in the presidential year on the joint ballot. Or the President could be given a six-year term, members of the House a three-year term, and the Senate divided into two classes so that, again, half would be chosen in the presidential year on the joint ballot. This would have the added advantage of extending the life of a Congress from two to three years, which would give it a longer time to handle its legislative load and give it two rather than only one year to concentrate on legislative matters before its members had to suffer the distraction of the imminent campaign for reelection.

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Principal Executive-Legislative Conflicts over Fiscal Policy, 1946-76, with Retrospective
Appraisal as to which Branch was more Nearly Correct
(from a Keynesian perspective)

Date	Position of Executive Branch	Position of Legislative Branch	Outcome	Which Branch Was More Nearly Correct
1947-48	Opposed tax cuts	Passed tax cuts; one finally enacted over veto	Cut ideally timed for 1948-49 recession	Legislative
1949	Sought tax increase	Delayed acting on President's request	Request withdrawn when recession became clear	Legislative
1951	Sought tax increase	Enacted half of requested increase after delay of nine months	Inflationary pressures eased during delay	Legislative
1954	Proposed extension of excise taxes	Enacted half of requested extension	Tax lapse well timed for 1954 recession	Legislative
1957-58	Opposed anti-recession spending measures	Enacted some measures, mainly highways and housing	Measures provided marginal economic stimulus	Legislative
1962-64	Proposed tax cut	Enacted twenty months later	Revived stagnant economy	Executive
1967-68	Proposed tax surcharge	Insisted on tying tax increase to budget cuts, with 17-month delay	Inflation rose rapidly during delay	Executive
1969-70	Opposed legislation authorizing controls	Attached legislation as rider to an urgent bill	President invoked controls in 1970	Legislative
1971-74	Demanded cuts in spending	Made smaller cuts than president demanded	Budget deficits contributed to rapid inflation	Executive
1975	Policy provided limited economic stimulus	Provided stimulus through tax cuts and spending increases	After presidential veto, compromise reached, and lagging economy stimulated	Legislative

THE NEED
FOR A BICENTENNIAL REVIEW
OF THE UNITED STATES CONSTITUTIONAL SYSTEM

When the Founding Fathers met in Philadelphia in the summer of 1787 they were preoccupied with the threat of tyranny. Having won freedom from the despotism of George III, and having experienced arbitrary rule from some of the new state legislatures, they were resolved that the Constitution they were drafting must protect the young republic against the concentration of governmental power. So they dispersed the powers of government -- dividing them first between a federal government and the states; then at the national level between separate legislative, executive, and judicial branches; finally, within the legislative branch, between two independent bodies, a Senate and a House of Representatives.

This unique structure of "separation of powers", of "checks and balances", has served well the purpose of averting tyranny. In its nearly two hundred years under the Constitution, the republic has never been menaced by autocracy in any form. Yet a governmental structure deliberately designed to frustrate a despot who seeks to assemble its powers for evil purposes must also, inevitably, frustrate democratic leaders who have been chosen by the people to exercise its powers for good and worthy ends.

That is the dilemma of the American constitutional system. The checks and balances created in the Eighteenth Century to guard against the perils of that day have led repeatedly, in the Twentieth Century, to governmental stalemate and deadlock, to an inability to make quick and sharp decisions in the face of urgent problems. Rash and impulsive governmental actions are deterred -- and that is a benefit -- but one gained often at the cost of an incapacity to act at all, or at least to act in a timely and decisive fashion. And when stalemate occurs, the people have difficulty holding anyone accountable. The President blames the Congress; members of Congress blame the President and one another, and amid the recriminations people lose confidence in government altogether.

During the past hundred years, many careful observers of the constitutional system -- beginning with the young Woodrow Wilson in the 1880s -- have looked abroad at what appeared to be more effective, yet no less democratic, governments and urged that this country's basic institutional structure be reexamined in the light of modern needs. Many of the critics have emphasized the weaknesses of the United States government in the conduct of international relations, citing the many occasions when presidents have been checkmated by the Congress -- or by one house of the Congress, or even a single committee -- that pursued its own foreign policy in conflict with that of the president. But in the 1930s, a wave of criticism arose from the government's inability to unite on an effective course of action to counter the Great Depression, and in the 1980s the need for concerted action to cope with inflation, recession, and high interest rates has aroused new anxiety about the adequacy of the country's basic constitutional structure.

In considering specific Constitutional amendments that might bring a greater degree of unity to the separated and conflicting organs of the federal government, there are many models. Indeed, the United States stands virtually alone in the democratic world in the extent to which the powers of government have been dispersed. In the United Kingdom, in the several countries formed from dominions of the British Empire, and in most of the democracies of continental Europe, executive and legislative powers are fused through one form or another of the parliamentary system. In that structure, the executive is formally a committee of the legislature chosen or approved by it, and subject to its control.

One school of thought holds that in order to unify the United States government, this country would have to replace its presidential system in its entirety with a parliamentary structure. Only by adopting a fully unified structure, it is argued, can the fundamental weakness of the American system be overcome; anything less would preserve the separation of the executive and legislative branches and, with it, the inevitable tendency to conflict and stalemate. The opponents of this view advocate incremental and piecemeal change, instead, on both practical and theoretical grounds. On the practical side, they contend that the American people would not seriously consider scrapping their two-hundred-year-old system in its entirety for a structure that was alien and unfamiliar and whose suitability for a nation with our unique political and cultural traditions has not even been tested, much less demonstrated. Moreover, they point out, astute observers in countries governed by parliamentary systems find serious flaws in those systems, too, and often look to features of the American system for the remedies. If government can suffer from too much dispersal of power, so can it suffer from too much concentration -- the executive can be all-powerful, closed and secretive in its decision-making processes, not effectively checked or balanced by any other institution, despite the theoretical power of the legislature to exercise control.

The two approaches may not be as different as they appear. Those who advocate a parliamentary system would have to face the need to examine the weaknesses and dangers in a structure of concentrated power and come forward with modifications to overcome them -- modifications that would, presumably, be in the directions of some separation of power, some checks and balances. Those who advocate incremental change in the American system in order to lessen the impact of checks and balances would, in all likelihood, adapt their changes from one or another parliamentary system. Beginning at opposite ends, the two schools might ultimately meet somewhere in between, agreeing on the means of combining the best features of both systems in an amended U.S. Constitution.

In any case, the types of amendments that have been, or might be, proposed to alleviate the separation of powers problem can be grouped under four headings:

1. Interlocking the Executive and Legislative Branches

One approach to bridging the gap between the executive and legislative branches is to permit the same officials to serve in both.

In one type of proposal, executive officials -- Cabinet members, in the usual version -- would be given a role in the Congress. In the most limited scheme, they would be authorized to appear on the floor of the House or Senate to answer questions and supply information (and the President himself could be included in such a plan). In a more ambitious variation, they could participate fully in debate, and so act as floor leaders for administration measures. Going even further, they could be given full status as members, with the right to vote and to chair committees. Executive participation in the legislative process, whatever the extent, would presumably promote harmony between the branches by forcing Cabinet officers and legislators to work together intimately rather than at arm's length, and to join in responsibility for the legislative output.

As an alternate means to the same end, legislators could be brought into the executive branch -- again, usually as the heads of Cabinet departments. The Constitution -- which now forbids such appointments -- could simply permit the President to name some, or all, of his top administrators from the legislative branch, or it could require him to do so. If he chose committee chairmen, they would not only run their departments but be in a position to pilot their departmental legislation through the Congress. Many of the disputes between the branches that now so often paralyze the government would be automatically averted, since the same officials would have key responsibilities both as administrators and as legislators.

Any but the most limited of these proposals encounters the practical difficulty presented by the bicameral structure of the Congress; a Cabinet officer chosen from one house of the Congress, or a Cabinet officer given a seat in one house, would not necessarily have influence in the other. A second practical problem would arise whenever, as at present, one or both houses is controlled by the opposition party; a Republican president presumably would not find it acceptable to appoint his Democratic opponents to the Cabinet, but to appoint members of the minority would not necessarily induce harmonious relationships with the majority. For any measure along these lines to bring the expected benefit, therefore, the election system might have to be changed as well, as discussed below. But an analogous problem arises from the factionalism of the parties; the President's department heads, whether chosen from the Congress or given seats in it, might be at odds with the majority of his own party in the legislature, or at least with the majority of those members of his party most influential on a given subject; yet if the President were required to appoint persons from among those influentials or acceptable to them, those appointees might be incompatible with him.

2. Breaking Stalemates through New Elections

At times when the government is hopelessly stalemated through conflict between the branches, the deadlock could presumably be broken by new elections. Power could be granted the president to dissolve the Congress, or could be given the Congress to remove the President, or both, any such action to be followed by new elections.

This concept has many variations. The power could be limited to one side: the president could be given power to dissolve the Congress and call for new congressional elections, or the Congress could be given power to remove the president through some method more workable than the present clumsy and restricted impeachment process, a new presidential election to follow. Or both branches could be given the power to initiate the action; that would balance the risks as between the branches by assuring that, whichever branch acted first, the other could also exercise its power and both the president and the members of Congress would have to submit to the new elections. Such a requirement would also assure that the power on either side would not be used lightly or simply for partisan advantage.

If the Congress had an easier means to remove the president, then in a time of crisis, when the president had lost his power to lead and govern and public sentiment was aroused in favor of removal of the president -- the Watergate period comes to mind -- the Congress would be able to do what the time and the circumstances required. Such an amendment would not only facilitate the resolution of policy deadlocks but would provide a safeguard against continuance in office of a president who fell victim to a mental or emotional disturbance but was not disabled under the terms of the Twenty-fifth Amendment. If the president possessed the power to dissolve the Congress (the dissolution might apply to only one as well as to both houses), a chief executive with strong backing in the country whose program was obstructed on Capitol Hill would have a way of taking his case to the country and getting the barrier removed -- or, perhaps, of winning his point by simply threatening to dissolve the legislature. Various restrictions on the use of dissolution and removal powers have been suggested: the Congress might be required to act only by an extraordinary majority of, say, sixty percent; the President might be restricted as to the time during his term when he could act.

Any proposal to break stalemates through new elections encounters the difficulty that in the United States elections are scheduled by the calendar. Would those elected in the special election fill only the unexpired terms? If so, one more election would be added to a calendar that, in the view of many, already calls for elections at too frequent intervals. The alternative would be to begin full terms at the time of the special election, but this would go counter to the long American tradition of holding congressional and presidential elections in the Novembers of even-numbered years. A more difficult practical problem would be how to reconcile the calling of a special presidential election with the established nominating process. The formal presidential selection process now covers nine months; if a special election were to be held, how would that process be compressed into a much shorter period of time without violating the open, participatory procedures -- through presidential primaries and caucuses -- that have come to be accepted and forcing a fundamental change in the character and organization of the political parties? But the prospect that the change would have just those effects is advanced as an argument in its favor by those who believe party organization should be strengthened, public participation in the nominating process curtailed, and the duration of the presidential selection turmoil drastically reduced.

3. Linking the Branches through the Election Process

The methods by which presidents and members of Congress are chosen have much to do with determining whether they will work in harmony or disharmony in office. The present system, which provides for separate and independent selection of presidents, senators, and representatives, does nothing to bind their candidacies together and create a sense of interdependence. To the contrary, independent candidacies encourage independent conduct in office. Moreover, they make possible divided government — a president of one party and one or both houses of Congress of the other -- which inevitably produces partisan conflict between the branches and always, sooner or later, deadlock.

Changes in the electoral system could, therefore, bind the presidential and legislative candidates more closely together. The most limited amendment designed for that purpose would be that proposed by President Johnson, providing a four-year term for members of the House coincident with the term of the President. The House of Representatives elected with the President is ordinarily -- and especially after a landslide election such as the one of 1980 -- more amenable to his wishes than the one elected at mid-term, when the political tide usually runs against the chief executive; if the mid-term election were eliminated, then, and members knew that when they sought reelection they would be running on the president's ticket (or the ticket of his successor as presidential candidate and party leader), the members, it is reasoned, would tend to be drawn closer to the president.

However, as long as voters can split their tickets, simply electing presidents and representatives at the same time does not assure the president a loyal House following. Indeed, in four of the last seven presidential elections — those of 1956, 1968, 1972, and 1980, three of which were landslides -- the president was not even given a House majority of his own party. Hence, some have proposed going further by requiring that the voter cast a single ballot for a presidential candidates and the candidates of the same party for the House -- just as presidential and vice presidential candidates are now tied together as a single slate. Under such a system, because either the presidential or House candidate could drag the other down in the next election, they would have a strong incentive to give each other mutual support while in office. Going further in the same direction, senatorial candidates during presidential years could also be locked into the slate chosen by a single vote. If the terms of senators were shortened to four years or extended to eight, or if senators, representatives, and presidents were all given six-year terms, the mid-term election could be eliminated altogether. The House would always be of the president's party and its members intimately linked with him; if the senatorial term were made coincident with the president's, that would be true of the Senate also.

Advocates of a six-year presidential term, with reelection prohibited, contend that such a change alone would mitigate the tendency to stalemate by enhancing the President's prestige in the country and hence in the Congress. A president never concerned with reelection could stick to his principles, rising above the partisan struggles, it is argued, and members of Congress would be more willing to follow his lead. The principal counter-argument is that, for a bad president, six years are too many and, for a good one, too few. The former objection could be met, of course, if the six-year term were combined with a simplification of the process of removing incompetent presidents, as discussed above. Opponents of the non-renewable six-year term also argue that the president's standing with the Congress would be weakened rather than strengthened, because from the time of his inauguration he would be a "lame duck" and senators and representatives of his own party, rather than following his lead, would be organizing competing factions to win the next presidential nomination. The reasoning that lame-duck presidents are in fact weaker leads to the conclusion that the Twenty-Second amendment, which limits a president to two terms, was a mistake and should be repealed. Finally, it is pointed out, even lame duck presidents engage deeply in partisan politics in order to enhance the chances of their party in the next election -- as did President Eisenhower in his second term.

If the six-year term were adopted, House members could be granted a three-year term and senators divided into two classes rather than three.

Finally, the president could be chosen by the Congress rather than through direct election, as in parliamentary governments.

4. Altering the Balance of Power between the Branches

Several of the possible Constitutional amendments affecting relationships between the executive and legislative branches are not designed primarily to make easier the resolution of interbranch conflict but rather to influence the outcomes of those conflicts. Yet some might facilitate conflict resolution as an incidental consequence.

A modification of the two-thirds Senate majority now required for treaty approval would give the president greater authority in the conduct of foreign policy. The Versailles treaty was approved by a majority of the Senate but failed of winning two-thirds, and the SALT II treaty had majority support at the time it was withdrawn. The approval requirement could be reduced from two-thirds to sixty per cent of the Senate, or a majority (perhaps a majority of the membership rather than simply of those voting) of both the Senate and the House.

An item veto provision, common in state constitutions, would give the president a much stronger hand in the legislative process. It might also make the resolution of some conflicts easier by allowing the undisputed portions of bills to become law while the executive and the legislators negotiated the points of disagreement.

A provision requiring an extraordinary majority in the Congress to increase the President's budget, or to forbid such increases, would likewise strengthen the President's position.

Depending on the outcome of cases now before the Supreme Court, the proper scope of the legislative veto, if any, could be written into the Constitution. If the Court rules that the veto is unconstitutional, it could be authorized by an amendment, either in unlimited form or with prescribed limitations. Conversely, if the Court finds the veto constitutional, an amendment could outlaw it or limit its use.

To enhance the status of the President's program, the Constitution could require that essential measures, as identified by him, be brought to a vote on the floor of each house within a designated time period.

CONSTITUTIONAL REFORM PROPOSALS LISTED

Representative **Reuss**. Thank you very much, Mr. Sundquist. I wonder if you would take a minute or two more just to outline the proposals mentioned in your paper. You mentioned only one of three or four proposals. I would like to have at least the outline of the rest before us.

Mr. **Sundquist**. I classified them into four categories. The first category includes devices for interlocking the executive and legislative branches. That amounts to interchange of personnel.

One approach would be to put members of the legislative branch in the executive branch, perhaps in the form of Members of Congress serving in the Cabinet. This would require a constitutional amendment along the lines of the one introduced by you, yourself, Mr. Chairman, I believe in the last Congress as well as this one.

Or, executive branch officials could be given status in the legislative branch. That has a lot of variations. They could participate in debate, they could be there to respond to questions. Or they could be made members of the legislative branch, as in parliamentary countries, so that they could chair committees and manage their own legislation during the legislative process.

The second category includes proposals to break the stalemates and deadlocks that develop in our system through new elections, again as in parliamentary countries.

The President could be given some form of authority within appropriate limitations to dissolve the Congress when the two branches are hopelessly stalemated. Or conversely, when the President has lost the confidence of the country and of the Congress, there could be some simplification of the removal power, so that Presidents who are hopelessly unable to perform for one or another reason could be removed and the country could get off to a fresh start. That, too, was covered in a Reuss resolution of some years ago.

The third general category I called linking the branches through the election process, and it is in that category that the possibility of linking candidates for President, Vice President, and the Congress on the same slate to be voted by a single vote, has its place. That could also be combined with changes in the length of terms, as I said in my statement.

Finally, there is a group of constitutional amendments that don't bear very directly on the separation of powers as a problem, but would alter the relations—or the balance of power—between the branches. These include modifying the treaty approval power to something less than a two-thirds vote of the Senate; the item veto, which has been supported over the years by many; a requirement that the Congress give prompt attention to Presidential recommendations, which, of course, would not require a constitutional amendment, but could be made mandatory by one.

And finally, the legislative veto. Those are the main ones.

Representative **Reuss**. Into which of those four categories does the proposal contained in your principal presentation fall?

Mr. **Sundquist**. The third category, linking the branches through the election process.

Representative **Reuss**. The third category.

Thank you very much, Mr. Sundquist. We will be back with some questions shortly.

Mr. Hermens, please proceed.

STATEMENT OF FERDINAND A. HERMENS, RESEARCH PROFESSOR, AMERICAN UNIVERSITY, WASHINGTON, D.C.

HISTORY OF SEPARATION OF POWERS DOCTRINE

Mr. **Hermens.** Mr. Chairman, you have been kind enough to assure us that our statements would appear in the record, and as a result I will take the liberty of simply making a few remarks based on reflection and practical experience.

To begin with, being able to discuss the virtues and the possible failures of parliamentary government makes me feel younger, 60 years younger. It reminds me of the time during the early 1920's when, in a German high school some of us were arguing in favor of parliamentary government with classmates of a more rightist persuasion.

STRUCTURE IS AT FAULT

Our arguments were rather unsophisticated, but in due course we became familiar with Max Weber, the social scientist who is now almost as well known in the United States as in Germany. Weber was highly critical of the blunders committed by Emperor William II. Still, in a letter to his friend, Friedrich Naumann, written immediately after the Daily Telegraph affair, he stated that the personality of the Emperor should not be blamed too much, for "the structure is at fault." It was the constitutional structure of the German Empire which permitted a man like William to come to the top, and then failed to provide for the institutional safeguard with the help of which he could either be effectively restrained or, if that did not work, be forced out. Weber's implication was always that the country needed parliamentary government, with actual power in the hands of a government subject to a vote of censure. In that case William would have been relegated to a position with most of his functions merely symbolic.

This solution had developed in England where the Emperor's grandmother, Queen Victoria, was very effectively checked by the Prime Minister of the day. When her great-grandson came to power as Edward VIII he wanted to be a king and, in addition, developed certain associations which, in the field of foreign affairs, were so delicate that the country's secret service felt it necessary to intervene. When, in the end, the King was forced out it was, in the opinion of some, now confirmed by recently published documents, that perhaps Mrs. Simpson only provided an occasion for ending a situation which could not last.

That William II presented problems was, just a couple of years after his accession, clearly seen by Woodrow Wilson who, in a lecture later published under the title, "Leaders of Men," called the German monarch a bumptious young gentleman slenderly equipped with wisdom or discretion. William soon committed his blunders and enough people saw them. But those around him who filled high positions were selected by him and served at his pleasure. They were, for the most part, honest bureaucrats rather than political leaders with insight and force. They could not stop William when he permitted Bismarck's careful arrangements for a European balance to be disturbed and let people act in such a way that, on August 1, 1914, he felt that he had no alternative to signing the declaration of war on Russia, the beginning of the First World War.

When Max Weber argued that the structure is at fault he may not have been aware that he was treading on methodological grounds, which were also those of the Framers of our Constitution. Their approach is so modern and yet so unpopular with certain well-known leaders of our intellectual elite, that we should extend the call for a return to basics from the bottom of our educational system to its top. If some of our historians are now of the opinion that what is wrong in our political life is the persons and the policies of recent leaders, they are imbued with the methodology of the German historians of the 19th century. Leopold von Ranke was first among those who concentrated all attention upon such a particular era in history, including personalities. Their views were popularized under the slogan "Men Make History." Theodor Schieder, of the University of Cologne, has recently reminded us that Ranke's starting point was the rejection of liberal constitutionalism. The liberals of that day were indeed of the opinion that the autocratic features characteristic of the German kingdoms and principalities, as well as of the later empire, were outmoded and needed to be replaced by the type of general constitutionalism, as it has developed in the English version of parliamentary government.

In this country too, we have historians who see in history the general as well as the particular. The two, of course, are present simultaneously and they interact. Prof. Henry Steele Commager's slender, but weighty, volume on "Majority Rule and Minority Rights" provides a good example. We all regret that he cannot be with us today.

In our day the task is, as it was in 1787, to concentrate on the general and to remember that, as James Madison put it in The Federalist No. 10, decisive consequences may result from the form of government itself. In The Federalist No. 48 he was more concrete and emphasized that while some of the difficulties encountered in what we now call the critical period of American history, might be imputable to peculiar circumstances connected with the war yet the greater part of them may be considered as the spontaneous shoots of an ill-constituted government. Ten years earlier, Alexander Hamilton, writing to Gouverneur Morris, had emphasized that when, in the course of history, democracy had failed, the reason was, more often than not, that it operated with improper channels of government.

Madison and Hamilton, were they with us, would not hesitate to apply the same methodological criteria to our present Constitution and to ask themselves whether in that new critical period of American history in which we now find ourselves, some of our troubles might not result from the form of government itself.

In our day the Framers would first emphasize the strong elements in our constitutional structure, the ones concerned with "The Representative Republic" and "The Federal Union"—I have tried to deal with details in my book, "The Representative Republic"—These elements have served as the anchor of our freedom and as a beacon for the rest of the world. They too are now challenged under the title of "reform"; those who want to retain what is good and basic in our structure will do well to keep a critical eye on the pertinent proposals.

DECISION IN FAVOR OF ELECTORAL COLLEGE

The second part of our political system, which deals with the Executive and its relations to the Congress, is something else again. When the delegates came to Philadelphia they were rather uncertain as to this part of their work on which, characteristically, both the Virginia and the New Jersey plans were vague. Then came the great battle over the relations between the large and the small States. When, at last, the "Connecticut Compromise" had provided for a happy solution, the delegates approached a state of exhaustion. The Committee of Detail which was then set up accomplished much in 10 days of concentrated work. It is interesting to note, however, that it voted, as the Convention had done repeatedly before, in favor of electing the President by the Congress. Had that become a part of the Constitution our political system would have been entirely different from what it is now. The decision in favor of the electoral college developed rather rapidly at the end when everyone wanted to go home, and the delegates were none too critical of what appeared as a happy reconciliation of divergent views.

Eventually, some members signed the draft with misgivings, including Benjamin Franklin, Alexander Hamilton, and James Madison, notwithstanding the fact that the last two later led the fight for ratification and defended everything as it stood. Three of the most active members of the Convention, Edmund Randolph, George Mason, and Elbridge Gerry, did not sign at all, although Randolph was later prevailed upon to support ratification. Some of the misgivings of these men, in particular in regard to the single executive, were later to prove prophetic.

With all of its possible shortcomings the American Republic had, during its first four decades, been run by a fairly closely knit group of men who had been thoroughly schooled in the work they were to do. Andrew Jackson, the first beneficiary of popular election, owed his rise to his military reputation. When the first outsider became President it was natural for him to have other outsiders as his advisers, and the Kitchen Cabinet was born.

The then following decisions in the economic field, in particular in regard to the veto of the extension of the Bank of the United States, and the Specie Circular, had grave and lasting consequences. They are dealt with in my prepared statement. The same applies to the political economy of the world economic crisis and of the New Deal.

The chairman asked me, however, to make a few comments on the current situation, supplementary to what my prepared statement contains on the budget deliberations of 1981 and 1982. I had referred to the cyclical character of Presidential power which made it inevitable that the high of 1981 should be followed by a low. As of now there has been but a moderate low. Ronald Reagan stands, even after the midterm elections, higher in the scale of Presidential power than most Presidents have done most of the time.

This leads to conclusions which may seem to contradict what has been said before: Is not this one of the times when an attempt should be made to make the best of both worlds? Divided powers are with us. Throughout its history the country has been able to come to terms with them only became conscientious men in the Congress as well as in the administration did their best to achieve cooperation within a system which, according to its logic, does not favor it. These men performed what a medieval theologian would have called acts of supererogation. To rely on such endeavors forever is hazardous. But, if there ever have been exceptional opportunities for cooperation, the Reagan administration produced one in 1981, and much of it survives. The President's ability as a communicator remains excellent. He can move without losing face from the narrow mandate characterized by a particular version of supply-side economics to the broader one which a majority of both the people and of the Congress are willing to accept. Even the midterm elections of 1982, instead of paralyzing the country, demonstrated once again what Joseph Kraft called the magic of our electoral system: The voters of both parties sent, in the majority of cases, true moderates to Congress.

Cooperation is most urgent in the field of economic policy. Observers as different as Henry Kissinger and Henry Kaufman have referred to the dangers involved in a crisis of our national and of the international banking systems. Furthermore, recovery, when it comes, may be anemic—not enough to restore the momentum of the free world.

This is not the place to point out details. That has been done for some time by economists willing to forego jeremiads and to recommend measures which are largely a matter of commonsense. The real obstacle to identifying and applying them is political.

It is, however, characteristic of our system that in such matters the Congress cannot act by itself. If it tried, the results would risk being typical of past periods of congressional government. Coordination can only come through Presidential leadership, and we do not know how long it will be strong enough to be effective.

But by this time I am sure my time is up and I thank the chairman for his patience.

[The prepared statement of Mr. Hermens follows:]

Prepared Statement of Ferdinand A. Hermens

Divided Government and economic policy

The influence of our system of divided powers on the country's economy has been profound. These brief remarks will concentrate on one of them: the cyclical character which decision-making in the economic field may assume under certain circumstances. When this happens, periods of semi-paralysis are followed by one or several years of frenzied activity. The "high," however, is sooner or later followed by a "low." Furthermore, what is done during the peak of presidential power may be flawed by irrational influences, some of which can have long-lasting effects.

I. The Jackson Administration and the Development of the United States Banking and Currency Policy.

Andrew Jackson's rule followed four years of almost non-rule under John Quincy Adams, who presided over a period often characterized as one of "futility." The people were ready for a hero to step in and fill the void. Jackson did so, and he was the first outsider (in spite of a brief and inauspicious membership in the Senate) who ran against what we now call "the Washington establishment." The large-scale turnover in government officials which followed his inauguration intensified the change, marking his presidency as the first one presenting the country with a "Government of Strangers."

The new government also exhibited those drawbacks of one-man rule which caused men as different as Benjamin Franklin, Edmund Randolph and George Mason to feel apprehensive about a single executive. Where it exists, the man at the top may be willing to listen to unpleasant news and to take responsible advice, but no one can force him to do so. The members of the American cabinet are mere presidential assistants liable to dismissal at will. Being barred from membership in the Congress they lack a power base of their own on which they could fall back. Thus, no one was able to keep Jackson from following his own bent in the most fateful act of his administration: the veto cast against the renewal of the Charter of the Bank of the United States. Its predecessor had, to be sure, been a Hamiltonian creation, vigorously opposed by the Jeffersonians. When it expired it was, however, sorely missed, in particular when it proved so hard to finance the War of 1812 and to control the resulting inflation. Albert Gallatin was a leading proponent of the second Bank of the United States; James Madison was the President who signed the bill establishing it. Andrew Jackson was a "hard money man" at heart, and as such should have favored the bank. The pertinent arguments had been digested for him in a little book by Gallatin,_/ but Jackson was guided by resentment rather than by reason. The immediate result was the impossibility of applying "macroeconomic" measures, badly needed during the boom of the 1830's. The first boom this country experienced was fed by irresponsible speculation.

Small banks, favored by Jackson, fuelled the flames. In the words of Charles A. and Mary R. Beard:_/ "In the Mississippi Valley such banks, sometimes entirely owned by state governments, sprang up like weeds and issued torrents of paper money based on little or no gold and silver coins." The Bank of the United States, soon to go out of business, could do nothing. In the end matters were made worse by the "specie circular," which ended the sale of public land on credit and demanded the payment of outstanding debts in specie. The Congress passed a law to keep the circular from going into effect, but Jackson's veto was dated March 3, 1837, at 11:45, fifteen minutes before the termination of his presidency, making it impossible for the expiring Congress to override it. Thus, the President's policies had first placed the state banks firmly into the saddle and allowed them to inundate the country with their credits. Then, there came the harshly deflationary step of the "specie circular," which, in the words of Joseph Schumpeter_/ "under the circumstances amounted to an official declaration that the state banks were not to be trusted."

The ensuing depression was international, and some of the difficulties experienced in the United States were due to overseas influences. However, to quote again Schumpeter: "Jacksonian policies--the hostility to central banking, or, in fact, any control of credit creation--may be held responsible for its (the boom's) violence, as well as for the violence of the subsequent fall."_/ It is difficult to see how, with a parliamentary government, formed

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_/ *Considerations on the Currency and the Banking System of the United States*, first published in 1831; reprinted in New York in 1968.

_/ *A Basic History of the United States* (New York 1944), pp. 243-255.

_/ *Business Cycles*, Vol. I, p. 295.

_/ *Ibid*.

by the leaders of the Congress and acting in harmony with the two Houses, these decisive mistakes could have been made. Jackson's successor, van Buren, was to become the victim of the panic and the depression, eventually suffering the kind of electoral defeat which Herbert Hoover was to experience a century later.

One particular result of the absence of a central bank might be discussed in some detail, namely, the difficulty in handling monetary panics. The Bank of England had groped its way to a solution in 1825: A general run on the country's banks was imminent, and it was prevailed upon to adopt what was later called a "policy of bold generosity," declaring itself a "lender of last resort": Every bank, if reasonably sound, could borrow from it whatever it needed to prevent a "run" by its depositors, who failed to understand that no bank could stay in business if it held enough cash to cover all of its demand deposits; it was, and is, customary to tailor cash on hand somewhat above regular demands for withdrawal,as demonstrated by experience. When a panic takes hold, depositors simply want "their money back;" unless the run is stopped, one bank collapses after the other. However, the people really want only the money which they cannot get. Offer it to them, and they will be satisfied, for it is not only inconvenient to keep large amounts of cash at home, but it also causes a loss of interest. As to the events of 1825, Walter Bagehot__/ reports: "After a day or two of this treatment, the entire panic subsided, and the 'City' was quite calm."

What had proved so successful in practice did not at once become a part of accepted theory. England took a step backwards when the Peel's Act became law in 1844. Henceforth the Bank of England could issue notes (beyond the 14 million pounds covered by government securities) only when they were fully covered by gold. During the depression of 1847 this situation threatened to lead to a new panic. At first the Bank resorted to restrictive measures in order to limit the demand for notes.__/ This happened during the Spring. When difficulties continued during the Fall the Cabinet, on October 23rd, authorized the Bank to issue notes beyond the legal limits, adding that if such a policy should lead to a violation of the law, Parliament, when it reconvened, would be requested to pass a bill of indemnity; under the British system there was no doubt that such a bill would pass. The letter was published

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__/ Lombard Street

__/ The best treatment of these events remains Henry Dunning MacLeod, The Theory and Practice of Banking, 2nd Vol. (London 1866), pp. 135 ff.

on Monday, October 25th, at 1:00 P.M.; the panic vanished like a dream: as soon as it was known that money would be available, the demand for it ceased. The bank did not even have to issue notes in excess of the authorized amount; all it made available additionally was 400,000 pounds.

Similar cases occurred in 1855 and in 1866.__/ and on both occasions the mere announcement that the government was willing to permit violation of the law sufficed in order to kill the panic instantly.

In the United States matters were, during the entire period from 1837 to 1933, to take a totally different course. The country's economic potential was certainly adequate to the task of stopping what Walter Bagehot called "a species of eneuralgia." Divided powers however, had made it impossible to have a central bank without which such a policy was so difficult that it was never considered. There were, of course, the problems connected with a splintered banking system. In Jackson's day there was no lack of tendencies in the direction of branch banking, which at that time began to develop in England. When, however, the flames of a counter-productive populism are fanned as they were during the Jacksonian period, so many powerful vested interests grow around small banks that reason has to retire. It was to take 150 years before the issue of branch banking became the object of serious discussions even if, for the time being, change was sporadic.

II The World Economic Crisis and the New Deal.

The Jacksonian heritage was very much alive during the world economic crisis. Herbert Hoover__/, two decades later, was to complain that "our banking and financial system was the worst part of the dismal tragedy with which I had to deal." The multiplicity of banks was complicated by the diversity in the 48 state systems of regulation, the combination leading to a kind of confusion known to no other country. The Federal Reserve System, created under Wilson after careful preparation, was expected to provide for an intelligent management of the money supply. While Benjamin Strong, who died in 1928, was governor of the Federal Reserve Bank of New York, succeeded with his insistence on the need for funds if it should again come to a "breaking point," his successor, George Leslie Harrison, was less successful.__/ In

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__/ MacLeod, op. cit., pp. 153 and 158/9.

__/ Memoirs of Herbert Hoover. The Great Depression, 1929-41 (Manchester, N.H.) p. 21.

__/ Milton Friedman and Anna Schwartz, A Monetary History of the United States 1867-1960 (Princeton 1963), pp. 170 ff.

March 1930 the Open Market Investment Committee was placed under the direction of the twelve regional governors, the majority of whom opposed Harrison's call for an active policy. All of this fitted in better with the spirit of divided powers than with that of sound business management which one would expect to prevail in the United States.

A monetary panic threatened Austria during the summer of 1931. Barely averted there it soon swept Germany, was aborted by the devaluation of the pound in England, but assumed devastating proportions in the United States. The depression had, in the first half of 1930, followed a normal and moderate course. The contraction of bank credit soon made conditions worse but, during the summer there were signs of consolidation. After the German collapse in 1931 the French, unhappy with the Hoover moratorium, made massive withdrawals from the United States, which could have been handled without much trouble. Foreign short-term deposits in the United States totalled about $2.8 billion. There were similar American assets in foreign countries amounting to $1.75 billion, of which half a billion could have been recalled without serious difficulty, and the monetary reserves of the Federal Reserve System had just reached a new high of $5 billion. Had it been possible simply to use enough of these funds to cover foreign withdrawals the net result would have been the liquidation of foreign debts on which interest had to be paid with gold bars which yielded no return.

Yankee ingenuity is, however, not part of our politico-economic structure. Only a part of the gold held by the Federal Reserve was "free gold," as the law required that the balance be held as a reserve for the notes issued. There was no American cabinet which could, as the British did when the Peel's Act stood in the way of fighting off a panic, permit the Federal Reserve to act as an effective "lender of last resort," in the certainty that if a violation of existing law should actually occur, Parliament would pass a bill of indemnity. The financial hemorrhage had to run its course.

President Hoover still tried to do what he could. In September 1931 he induced the larger banks to establish the National Credit Corporation which on a cooperative basis was to assist banks which were basically sound but temporarily insolvent. The psychological [illegible] of the announcement were excellent, but the officers of the new institution dragged their feet. Therefore, in a message to Congress dated December 8 he requested the establishment of a government institution, which became the Reconstruction Finance Corporation. Congressional approval took six weeks, during which the President had to engage in elaborate negotiations with indi[illegible] members as opposition from both Liberals and Conservatives had to be overcome by a series of compromises._/ Valuable time was lost; the number of bank failures increased again in December and January.

Related measures faced similar difficulties. Thus, it took months to induce Senator Carter Glass, the chairman of the Committee on Banking and Currency, to accept a relaxation of the rules for loans by the Federal Reserve banks. While Conservatives wanted no change Liberals failed to see that relief for the unemployed should have been sought by separate measures, rather than being made a part of the lending operations of either commercial banks or the RFC.

In spite of all negative developments economic activity reached a plateau during the summer of 1932. Joseph Schumpeter_/ went so far as to say that "....we need not ask whether the system 'would have' recovered without political action stimulating it out of a state of prostration. For it did." He concluded that "but for the whim of the political calender," Hoover would probably "have come out with flying colors." The political calender, of course, asked for elections in November and for the inauguration of the new President in March. During a five-month interregnum Hoover was a lame duck, facing a Congress controlled by the opposition, and was himself hardly in a cooperative mood._/ The President-elect refused to meet with him, and Congressional pressure forced the publication of the credits granted by the RFC. In old and experienced financial centers it is a hard and fast rule that support for ailing banks must be known to very few persons. In the United States all details were published and partisan controversy caused them tp be presented to the public again and again. The result was new bank failures and, in February 1933, a panic in Detroit. When it spread, the new administration proclaimed a bank holiday. Most of the failing banks had been basically sound through temporarily insolvent; almost all of their outstanding claims could eventually be settled. Had hasty liquidations been avoided existing assets would not have deteriorated, leaving a substantial surplus rather than a loss.

_/ James Stewart Olson, Herbert Hoover and the Reconstruction Finance Corporation (Ames, Iowa, 1977), pp. 26 ff.

_/ Business Cycles, Vol. II, p. 984.

_/ Jordan A. Schwarz, The Interregnum of Despair. Hoover, Congress and the Depression (Urbana, Ill., 1970)

The classic epitaph to these developments is due to Senator Fulbright. Testifying before the Joint Committee on the Organization of Congress, he said:

> I think in Hoover's later years, the severity of the depression was vastly accentuated by the 2 years between 1930 and 1932 in that Congress would not go along with him. We could not do much. We just sat there and things got much worse in that period. You had a 2-year period in which perhaps something should have been done to prevent or lessen the severity of that situation.

When Representative Cox asked: "Is that a criticism of Mr. Hoover or of the Congress?" Senator Fulbright answered: "I think it is a criticism of the system. There was no way out of the situation."_/ What Senator Fulbright meant to say hardly was that there was absolutely no way out of the situation, but rather that to find such a way went "against the grain." Our leaders were confronted with what the medieval theologian would have designated as a call for "works of supererogation." Conceivably, such works might be performed, but in the ordinary course of events this will not, or at least not always, be done by ordinary men. On such ordinary men we must, however, rely.

The banking moratorium permitted the new administration to start at point zero; there was no way to go but up. The people were inclined to ascribe any improvement to the measures taken by the new President.

What happened between 1929 and 1933 had a profound effect on American political and economic thought. Public opinion is never an independent variable; it operates in, and is modified by, the course of events and the channels provided for its articulation._/ Americans had all but worshipped free enterprise during the 1920's. They became fundamentally critical of it during the 1930's, and their old faith, while reviving somewhat in the 1950's and 1960's, never was the same.

The dramatic events of March and April 1933 accelerated this process. The closure of the banks appeared as the end of an era. The most important step taken was the devaluation of the dollar. It was not unavoidable. A significant measure of "reflation" was compatible with the old parity, since ample gold reserves gave American monetary authorities a degree of freedom which others lacked. Devaluation added substantially to this leeway, however, and the road was free for a good measure of "reflation"

_/ Organization of Congress, Hearings before the Joint Committee on the Organization of Congress, 79th Congress, 1st session (Washington, 1945), p. 127.

_/ See the chapter on "The Travail of Public Opinion" in: Charles M. Hardin, Presidential Power and Accountability. Toward a New Constitution (Chicago 1974), pp. 142 ff.

as gradual credit expansion could have paved the way for a return to something like the price level of 1929. The old debts would have remained the same; nominal taxes and wages were likely to have increased slowly. This would have moved many a business out of the red, and restored to farmers and homeowners their old equity in their properties. The English recovery, after the devaluation of the pound in 1931, proceeded along these lines. A member of the House of Commons_/ recently commented on the result of the conservative policies pursued after the devaluation of the pound:

> Industry responded enthusiastically. The deficit in foreign manufactured trade, £79m in 1931, was replaced by a surplus of £23m within three years. Within six, unemployment was down by half despite a rapid increase in the labour force, and industrial output was up 64% (38% higher than in 1929). Our rate of growth was faster than at any time in our history and we became the most successful industrial country of the 1930s, Hitler's Germany and Roosevelt's New Deal included.

At first the American economy took the same path as the British, moving ahead at a particularly rapid rate. Irving Fisher's Index of Wholesale Prices rose from 79 in February 1933 to 103.7 in October, an increase of a fourth. Recovery set in immediately. The Federal Reserve Board's Index of Production rose from 60 in March to 100 in July, a jump of two-thirds. The production of iron and steel increased from 22 in March to 100 in July; what had been the "beggar" of the depression became once again the "prince" of the recovery. Evidently, improvement was general: only greatly increased consumer buying could make textile production rise from 76 in March to 130 in July.

Under such conditions there was reason to "leave well enough alone." Not only were the accomplishments substantial but more were on the way. The productive apparatus which has functioned so well until the end of 1929 was still there. While the deflationary effects of credit contraction had pulled the old pieces asunder, reflation, plus the normal healing effects of a recovery period_/ stood ready to put them together again.

But there were the dynamics of the American political system. They did not *force* things off the normal track, but they strongly favored the forces tending in that direction. In this process the highly personalized

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_/ Austin Mitchell, Letter to the Editor of *The Economist*, February 14, 1981.

_/ They are dealt with in G. Haberler, *Prosperity and Depression* (Cambridge, Mass., 1958), pp. 377 ff.

nature of the plebiscitary presidency played its part. Harold Laski_/ wrote under the impact of these events: "The need to dramatize his position by insistence upon his undoubted supremacy is inherent in the office as history has shaped it." Had Roosevelt let matters take their normal course, he might have had some difficulty in convincing the country that recovery came because "we planned it that way." He would have had a case; his ebullient personality helped people to feel more confident and encouraged them to buy and invest. The devaluation of the dollar hastened the pace of the early recovery, and a major part of the reform measures was both overdue and fit in well with the requirements of recovery. But that was not what the words, "planned it that way" conveyed; something more visible seemed needed to create the kind of a popular perception desired.

The second structural factor which facilitated both the change of policy and the change of public opinion was the extra leverage which the divided powers gave to interest groups and lobbies._/ While pressure groups are a vital ingredient of democratic government, there is a difference between a system in which the leaders of the majority constitute the government and guide the work of their parliamentary colleagues and one in which the legislature lacks the unifying leadership which the cabinet system provides. In England most lobbying activities are channeled directly toward the government; comparatively little can be gained by trying to influence individual members of Parliament. The executive, however, has to deal simultaneously with the problems confronting all groups, and certain contradictory claims will simply cancel each other out. The result was illustrated by President Lincoln who, on receiving the delegates of a particular group, opened another door to his office, admitted the spokesmen of the opposing group, and told the two to fight it out among themselves.

In the United States it is possible to bring profitable pressure to bear upon individual members of the Congress, who do have a decisive influence on legislation and on budgetary appropriations; they often represent districts or states in which a particular interest is so strong that they feel compelled to yield to its demands. The case is so frequent that both the House and the Senate may find it difficult to act in the terms which the

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_/ The American Presidency (New York 1940), p. 93.

_/ For the general aspects of those problems see Harold Laski, Parliamentary Government in England (New York 1938), pp. 136-139, and for a more detailed, and more modern, analysis to Charles M. Hardin, Presidential Power and Accountability, op. cit., pp. 119-141.

members themselves feel is for the general welfare.

One further incentive to rely on pressure groups and enact measures like the NRA and the AAA might be mentioned in passing. The Supreme Court had, during the period when it followed a laissez-faire philosophy, invalidated acts of social legislation which were becoming standard in industrialized countries. Under these circumstances reliance on action by interested groups as provided for in the NRA and the AAA appeared as a convenient way to circumvent a judicial veto. The Supreme Court invalidated the two acts anyway, but in the meantime the appeal to action by interested groups had had its effects on the American economy. Furthermore, when, in 1937, the Court began to reverse itself on the "due process", the "interstate commerce," and the "general welfare" clauses, an entirely new era in American policy-making began, and some felt that one extreme was followed by another.

In any event, the economic logic underlying the NRA and the AAA was flawed. The authors of these measures_/ concentrated on raising relative prices - the hourly rate of wages, the prices to be charged for individual goods and services, etc._/ Such raises tend to price the goods in question out of the market and overall purchasing power is decreased rather than increased. What was needed was, as mentioned above, already taking place: An increase in the general price level which permitted cost factors, including the hourly rate of wages_/ to remain relatively stable for some time in the

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_/ There were no economists of stature among them. The first economist to be given a position of major influence was Laughlin Currie, who came to the White House in 1939. Gerhard Colm, later a member of the first Council of Economic Advisers and author of its first annual reports, joined the staff of the Bureau of the Budget in 193 . He used to tell his friends about his surprise at the fact that he was one economist out of three on the entire staff.

_/For a detailed evaluation of American recovery policies see Joseph Schumpeteer, Business Cycles, Vol. II, pp. 971 ff. That criticism is not limited to those who might be considered right of center is made plain by Robert Lekachman in his The Age of Keynes,(Penguin ed., 1967) pp. 100-101.

_/ Trade unionists find it hard to understand that the overall purchasing power of workers depends as much on the number of workers employed and the number of hours they work as on the hourly rate of wages. If the latter is raised beyond the "equilibrium level," and if the elasticity of the demand for labor is greater than one (as it is more often than not) the amount of money received by all workers declines, sometimes substantially. A. C. Pigou (The Economics of Welfare, London 1924) and P. H. Douglas (Real Wages in the United States, 1890-1926, New York, 1930, pp. 572 ff.) are among the economists who have been explicit on these matters.

expectation of major increases to follow when improvements in productivity took place.

Few Americans have ever taken cognizance of the fact that as soon as the effects of the NRA became marked, American recovery suffered a setback. It then remained sporadic, and in the "recession" of 1937 industrial employment fell from a high of 109 in May 1937 to a low of 82 in June 1938, with industrial production declining from 117 in May 1937 to 76 in May 1938. A sustained recovery did not begin until the outbreak of the war in Europe. Only when the United States entered the war did the real upsurge of production and employment begin. Until then a comparison of the major industrial countries shows that, next to the France of the Third Republic, the United States showed the weakest recovery from the depression.

President Roosevelt's economic policies, which often assumed a highly personal note, cannot be said to have been those which were favored by the bulk of his party, in particular by its members in Congress. Vice-President John Nance Garner used to complain that political power had come to settle to the left of its political center. Under a parliamentary system, the Democratic victory would have been followed by instituting a Democratic cabinet consisting of the party's Congressional leaders. In this case a more broadly based and a more coherent and consistent policy would have been likely, in economic as well as in foreign policy.__/

__/ So far as foreign policy is concerned, consider the President's repudiation of both his Secretary of State, Cordell Hull, and his personal emissary, Raymond Moley, during the London World Economic Conference of 1933, and his failure to work with his Secretary of State in regard to the adoption of the policy of "unconditional surrender" and the initialling of the Morgenthau Plan during the second Quebec Conference of 1944. (Ferdinand A. Hermens, The Representative Republic, Notre Dame 1958, pp. 440-449.)

III. The Reagan Administration.

The great success which President Reagan enjoyed in his dealings with the Congress caused many to feel that the American political system had, once again, been proven to be workable, provided the right Chief Executive was chosen. Most of the President's budget proposals were adopted and his ultimate victory in the controversy engendered by the sale of AWACS planes to Saudi Arabia seemed to prove that he controlled foreign affairs as well. A visiting member of the British House of Commons is reported to have said that while Ronald Reagan did not strike him as "King of Capitol Hill," he appeared "at least as a prime minister." Tony Coelho, a Democratic member of the House of Representatives, was impressed by the Republican cohesion in Congress and felt that "the Republicans basically have moved to a parliamentary system, with all the discipline that involves."_/

Others remembered similar cases in American history, with a new President; if he was the right man and the hour favorable, he could accomplish much at first, but soon saw his power decline. In the words of James MacGregor Burns:_/ "But after the short honeymoon between President and Congress the old cycle of deadlock and drift will reassert itself." Evidence has, in the meantime, accumulated to suggest that [illegible] presidential preeminence represents the case of an unstable equilibrium. Once it is disturbed it is likely to be destroyed, with no tendency for it to return.

The following remarks will concentrate on the budgets for the fiscal years 1982 and 1983. The President's fiscal proposals had wide-ranging economic implications: First, inflation was to be brought under control. Then, what was widely perceived as excesses of the "Great Society" social legislation was to be corrected. Finally, there was to be a major shift of government activities to state and local authorities. These guiding intentions were largely welcomed by substantial segments of the electorate. There was a broadly based mandate for the President to make proposals along such lines, even if in regard to detail "the President proposes and the Congress disposes."

There was, however, also a narrower mandate. The President and many of his followers advocated **measures based on** "supply-side economics": Taxes likely to reduce the incentive to invest, or to take away capital needed for investment, were to be cut sharply. Since this could have inflationary results restraints on the money supply, as advocated by the "monetarists" and instituted by the Federal Reserve in 1979, were to be maintained in order to prevent "the monetarisation of the debt." Some proponents of "supply-side"_/ measures tended, however, to consider an increase in the

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_/ Quotations from David S. Broder, "President - or Prime Minister?" The Washington Post, September 20, 1981.

_/ The Deadlock of Democracy (New York 1963), p. 2.

_/ The quotation marks seem needed because the classical proponents of the view that (in the words of Jean Baptiste Say) "supply creates demand" do not limit themselves to the problems caused by taxation. The author hopes to take these issues up in a parallel paper.

deficit as less likely to fuel inflation than did the mainstream Republicans and the economists associated with them. It was, however, expected that if taxes likely to inhibit the incentives to investment were reduced sharply enough, "deflationary" flanking measures could be kept to a minimum. Actually, some "supply-siders" were inclined to view a substantial deficit as a less serious inflationary danger than did most "main-stream" Republicans and the economists associated with them.

The first question to be raised in the context of this paper is whether a program risking to create a large deficit would have been submitted by a cabinet formed by the Republican party's Congressional leaders. The future Vice-President and the future majority leader of the Senate had expressed their misgivings about "supply-side economics" in vigorous words, and former President Ford was known to hold similar views.

When we consider the 1982 budget, however, we must bear in mind that it bore no only the administration's stamp. More than one editorial took exception to the "bidding war" which was reported to have erupted, some Democrats feeling that if the Republicans could demand tax cuts without great concern for the resulting deficit, they could do the same. Senator Moynihan stated in a Senate speech, apparently referring to "the six years from 1981 to 1986":_/

> Too many provisions were added at the last minute by the administration and by Members of Congress in the bidding for votes. Democrats are as guilty of this as Republicans. I calculate the total cost of these provisions to be $150 billion. They ought to be reconsidered.

The figure is significant even if applied to a six-year period. All hoped that the high interest rates could be made to fall by reducing the deficit, and the amount mentioned by the Senator might have been of some help.

The next problem arose when the enactment of the "Economic Recovery Tax Act" failed to engender the expected wave of optimism in the financial markets, and Republican Congressional leaders felt that a "course correction" was needed. In August and September 1981 it was reported that there had been discussions between members of the Congress and of the White House staff, and that agreement had been reached on savings in entitlement programs and in defense appropriations. Budget Director Stockman was one of those who felt that there remained "fat" in the latter which could be eliminated without jeopardising efficiency._/ There was also the possibility of

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_/ Proceedings and Debates of the 97th Congress, First Session, Congressional Record, Vol. 127, No. 128.

_/ William Greider, "The Education of David Stockman," The Atlantic, December 1981.

"stretching" defense programs. Reference to the "entitlement" programs raised the usual storm but bipartisan efforts might have succeeded, in particular if action could have been taken before the campaign for the Congressional elections of 1982 began in earnest and led to the inevitable escalation of all negative positions. When, however, the President returned from his California vacation he failed to give his approval; he had, it was said, discussed the matter with old friends. That any action to reduce the deficit would have encouraged the financial markets became obvious the following year, when the combination of additional savings, "revenue enhancing"_/ as well as the closing of tax loopholes, passed the Congress and similar measures was signed into law by the President. The result was an intensification of the bull market at the stock exchange, and a very warm reception in Wall Street for the bill's principal sponsor, Senator Dole. The country's economic situation might by now have improved significantly had the plans made by Republican and Democratic Congressional leaders borne fruit a year sooner.

Some of the economic problems connected with these issues will be discussed in a separate paper. Reference, however, might be made to the wear and tear to which the members of both the Congress and the Administration were subjected by the prolonged budget controversies of 1981 and 1982. A report by the Congressional Research Service, dated July 8, 1981, concluded: "The 97th Congress has, of course, been occupied with nothing but budget matters." According to a report, dated October 26, 1982, the first session of that Congress spent 60 days on budget resolutions and reconciliation bills and 71 days on appropriation measures and continuing resolutions; it is added that the figures err on the low side. England's House of Commons has an easier task. In 1981/82 the standing committee discussed the budget on 11 days, and the committee of the whole House on 4 days._/ A good deal of parliamentary input has, of course, been telescoped into earlier Treasury and cabinet deliberations, the respective ministers (and sub-ministers) being members of Parliament and in contact with their fellow members.

_/That term does not deserve the irony with which it is often greeted. Thus, fees for the use of the waterways by private yachts and for the use of airfields, etc. by private planes are not taxes but compensation for services rendered.

_/ Letter from the British Embassy in Washington to the author, dated August 11, 1982.

Everything meshed, however, and the job was completed with reasonable despatch, leaving Parliament time to deal with other issues as they arose.

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What can be said in conclusion must begin by recalling that just when, in the 1830's, this country was entering the industrial age divided powers permitted its banking and currency system to be pushed into the wrong channels. Then, during the world economic crisis, President and Congress were led to tackle one another rather than the problems besetting their country. During the New Deal the meteoric rise of the presidency led to rapid, but at times irrational, action, setting the nation's thinking on a totally different course. Finally, as we find ourselves in that "zero-sum society" for which we seem to be fated for a decade or more, a new rise in presidential power brought new hope and new opportunities without, however, as yet yielding the fruits which a cooperative system could have achieved.

The free world, of which we are proud to be the leaders, suffers with us. Witness a story which broke just a few days ago. President Reagan had placed high hopes in constructive action for the Caribbean where, indeed, a stitch in time might save nine. One might be forgiven in assuming that after the passage of the Dole Act our Caribbean Basin Initiative was "all set." This was, however, the case only with the $350 million emergency aid provision, finally approved in October 1982. There remained two other parts of the plan which were more important in the long run: A provision for certain Caribbean Basin products to enter the United States duty-free for a 12-year period, and a ten percent incentive gax credit for American business investment in the Caribbean. In November 1982 Mr. Dan Rostenkowski, chairman of the House Ways and Means Committee, considered it necessary to dampen the hopes of the Caribbean leaders gathered in Jamaica, in which Edward Seaga's brilliant election victory of two years ago had given new hope to the moderate leaders of the area. According to Mr. Rostenkowski the House might not be able to handle the matter in the "lame duck session" and would consider the Caribbean Basin Initiative (CBI) "in the next six to eight months." Dominica's Prime Minister, Mrs. Eugenia Charles, retorted: "West Indians are going to lose faith in the CBI after all the delays. Really, it's time for your government to do something."_/ Mrs. Charles overlooked

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_/ Dan Bohning, "Caribbean Initiative Still Distant, Leaders Told," The Miami Herald, November 16, 1982.

the fact that while in her country, as in the other former British West Indian states, the parliamentary system does enable the government (supported by a legislative majority) "to do something," the story is different in the United States where sensitive measures, certain to attract the attention of vocal pressure groups, must, after having been proposed by the Administration, work their way through the subcommittees and the Committees of House and Senate, and then the two Houses themselves. With our hands tied by such constitutional fetters we are not able to act any faster on behalf of our friends than we can on behalf of ourselves. In this case Administration pressure prevailed upon the House Ways and Means Committee to pass the free trade portion of the CBI which, if finally enacted. will be a substantial help to the major Caribbean countries. "But for the tiny and backward islands of the Eastern Caribbean that need foreign capital to develop export industries, the failure to approve the investment incentives was a severe blow."__/

Mrs. Charles' Dominica is one of the sufferers, and the result is likely to be final: the Administration had, in response to intensive lobbying, withdrawn its support for this portion of the Bill. The Administration had done its best, but some of the good will which an early passage of the measure would have produced was lost, together with a part of the substance.

__/ Alfonso Chardy, "Free Trade Bill for Caribbean Wins Key Vote," *The Miami Herald*, December 10, 1982.

Representative **Reuss**. Thank you very much, Mr. Hermens.

We now turn to James Burns.

STATEMENT OF JAMES MacGREGOR BURNS, WOODROW WILSON PROFESSOR OF GOVERNMENT, WILLIAMS COLLEGE, WILLIAMSTOWN, MASS.

Mr. **Burns**. Mr. Chairman, I, too, very much regret the absence of Henry Steele Commager. And yet it is somewhat fitting that I be here, because not only am I a neighbor of his, but I have been profoundly influenced by Professor Commager, particulary in my early thinking about the American political system.

It may be better that he not be here, because Professor Commager may have departed from some of his ancient faiths that I will describe today. And perhaps it's better that he not be here to repudiate my version of them.

But I will speak for myself—and I think I am speaking for at least part of Henry Steele Commager—and, of course, he will speak for himself in his own submission. I say this because a book of his that profoundly influenced me was called Majority Rule and Minority Rights.

And in accepting this invitation, as you know, I urge that we not only have the kind of excellent statements that this committee has received, but have an opportunity to debate among ourselves some of the more difficult and controversial aspects of this whole question.

So, I look forward to that colloquy.

And to be somewhat provocative on this score, I am going to go back not only to Henry Steele Commager, who spoke for majority rule, but also for the American tradition of majority rule.

I might simply add, Mr. Chairman, that Professor Commager and I agree that we should compliment you and your committee both on your foresightedness and for your temerity in taking up these very difficult and complex constitutional and structural questions.

TRADITION OF MAJORITY RULE

The irony in the American political tradition is that majority rule has been considered, almost from the start, as one of the great goals of our system. And indeed, all through history, it has been the Presidents and the congressional leaders who have spoken for majority rule—not necessarily in those terms. They have spoken of popular rule—rule by the people.

And not only the great Presidents, but non-Presidents but great leaders, like William Jennings Bryan, spoke about rule by the people.

And what did they mean? Certainly, they did not mean rule by all the people. You cannot have rule by all the people. They were, in their own way, speaking about majority rule. And I could take much space and time to quote the great majoritarians of the past—an aspect of Thomas Jefferson, because there were many Thomas Jeffersons—Lincoln, and all the others, who, as I say, have spoken for rule by the plain people.

FEAR OF MAJORITY RULE

And yet, there has also been—very basic in this country—a fear of majority rule, a fear of naked majorities, not only on the part of people like Alexander Hamilton, but all through American history there has been this fear that somehow this beast—the people—will get loose and will overrun our Republic and then demagogs would take over. And, of course, the framers were enormously influenced by tales of the plight of the Greeks and Romans and other people who had succumbed to various forms of dictatorship.

Very early, as we all know, we balanced majority rule by a Bill of Rights on the proposition that this combination of majority rule and minority rights meant that the majority could do virtually anything as long as it did not trample on the right of the minority to try to become a majority. And the implications of that are very broad, because it relates to the media, it relates to questions of representation and many other processes and institutions that this committee is considering.

But assuming that we mean, by the Bill of Rights, a robust Bill of Rights, practical Bill of Rights, assuming that the majority must never in any way constrain the minority's right to replace it—to build its own majority and replace it—then, it raises the further paradox that, of course, we were not satisfied with the Bill of Rights as protection. And this was the great theme of Commager's book, as to why it was necessary to go beyond the Bill of Rights—why it was necessary to control that majority, to restrict it, to hem it in all through history.

CHECKS AND BALANCES

So we built a constitutional system very early that not only had in it the Bill of Rights—indeed, the Bill of Rights came after the original constitution of 1787—but built in it the famous system of checks and balances and division of powers that we all can talk about in our sleep. And as professors, sometimes we do.

In this case, the system was buttressed by the most elaborate system that is so represented in this committee chamber here and in this capitol that one need not deal with it further.

But the point, as was very clearly set forth by the framers, was to build in these auxiliary protections that would prevent the beast—the majority of the people—from coming loose, getting out of its cage, and trampling on the rights of the minority.

Not only did we erect a system of supplementary majority rule through both a system of Presidential elections and a system of congressional elections but we further complicated and disarmed popular impulses by forcing the public to operate through an elaborate system of cross-cutting congressional representation and Senate representation, with staggered terms and both overlapping and competing constituencies, even aside from the absolute check of one House on the other.

And hence, we ended up with a strange hybrid of a somewhat directly popular—or popularly elected—President and a complex mosaic of Senate and congressional constituencies.

I would argue that if we had simply adopted these two systems, with reasonably democratic legislative and executive—presidential—systems of representation, and if we had tied the two together and backed up by a robust Bill of Rights, then we might have protected the right of majorities to exercise their temporary will over the American polity.

But, of course, a result of many other factors that I'm sure have been examined here, the decline of the party system, gerrymandering—the original decision to have equal representation for all States, no matter how large, in the upper body—and many other aspects of our elaborate system of checks and balances, we have really added a third system onto the original combined executive and legislative systems of representation. And that addition, I think, lies at the heart of our problem. I think we, as a huge, vast, sprawling Republic, could operate and, indeed, probably need the two systems of representation, executive and legislative. To add onto that the burden of this whole other system, which has now become encrusted with enormous—the enormous role of money, the role of the media, the role of campaign packaging, and all the rest that we are so familiar with, I think the combination of this has produced the kind of deadlocks, the kind of stalemates that have been the subject of this—of these hearings.

Representative Reuss. What do you call this third system?

Mr. Burns. I don't have a short name for this third system, because it's such a congeries of representative and malrepresentative institutions that lie outside the original order, that I can't very well think of a term for this, because I'm talking about, as I say, this combination of, let's say, gerrymandering in the past in the House of Representatives; of malapportionment—that is, some congressional districts being very large and some small—though that, of course, has been largely corrected; the excesssive power of seniority in committees and subcommittees; and all sorts of processes within the House of Representatives and within the Senate—take simply the Senate filibuster, which, of course, is not in the Constitution—which are what I would call excrescences that have been added onto the original system of representation.

Now, I think the consequences of this third set of restraints on majority rule, on popular rule, have had the kinds of dire consequences that I'm sure have been well discussed before today—and certainly in the two excellent statements that we've just heard. And I don't want to take time to go into that.

INABILITY OF GOVERNMENT TO ENGAGE IN PLANNING

I would like to just pick out what seems to me one of the most serious results of this system and then to talk about what we might do, with the hope that this will lead to further examination of this in discussion here.

Of all the penalties we pay for the many failings that have been discussed here, to my mind the most serious is the inability of our political system to indulge in comprehensive, realistic, and effective planning.

It's very interesting, Mr. Chairman, to go back over American history and to look at some of the great epochal activities or episodes in American history.

Take immigration, the fact that, as we all know, we are the land of immigrants. It would be interesting to find not only anyone who had ever sat back and contemplated the enormous social and economic implications of immigration—probably there were such people who contemplated that—but even more the ability of the American system of government to act in advance of such immigration as well as migration within this country, such as from south to north—to recognize the implications for housing, for jobs, for health, for crime, and a multitude of other areas. Lacking in this country was the capacity to deal with that enormous social episode, with the result that much of the burden fell on the church, on urban machines, on philanthropy, all of which, of course, had serious limitations. This is only one example of many.

What to do?

I am very impressed, Mr. Chairman, that this committee would take on this very difficult subject because of the prevailing skepticism in this country that anything can be done of a serious nature about our political system. Anytime one gets beyond simply dressing up the system or proposing small incremental changes, that skepticism and even cynicism emerges.

WE SHOULD EXAMINE ALTERNATIVE GOVERNMENT STRUCTURES

I personally am dubious about the possibility in this country of sweeping constitutional change, such as the adopting of the parliamentary system. But I think, for two reasons, it's vitally important that we think hard about that alternative.

First, because there may well be—in the tumultuous century that undoubtedly lies ahead of us—there undoubtedly will be a series of national and worldwide crises in which the capacity of our system will be so sorely tested that many Americans—perhaps rather suddenly—will feel an urgent need for a change.

And it's very important that if we come to a point of great debate in this country over alternative systems, that we have done our homework, that we have in our intellectual bank the kinds of ideas, the kinds of analysis, the kinds of daring, imaginative posing of alternatives that I think will come out of these hearings.

And second, we have had to learn in this century that it's almost always the impossible and the unpredictable that do happen. We, you and I, in our early years, could not possibly, I think, have imagined the kinds of incredible developments, both benign and malign, that have taken place in the past 50 years.

So that, again, it seems to me that to consider the systemic changes is a matter of hard-headed practicality and not simply of a kind of dreamy investigation.

PRACTICAL PROPOSALS

But since I think that the resistance in this country, as a practical matter, is very strong to fundamental systemic change, like the parliamentary alternative, I end up considering two changes in particular that are essentially middle-level constitititutional changes. But I want to end on this note, because I'd like to get discussion back into the area of what I think is the area of practical and permissible change.

One of these is the Reuss bill, the proposal that we try to bring Congress and the Executive together in a more realistic way, in a more effective way. And it seems to me that this proposal is practical enough in its likely consequences—and yet sufficiently unthreatening to people who really don't want any structural change—as to be a prime candidate for further analysis and discussion.

The second proposal that has come out of these hearings—and particularly out of the work of James Sundquist—is the possibility of joint or combined electoral slates. This is a proposed change that, on the face of it, does not seem terribly threatening, if only because, in the States for many years, voters have been making changes along this line. That is, they have been moving toward longer terms for legislators and Governors, over the long span of American history.

At one time 1 year or 2 years were the accepted tenures for State officials. But many States have moved toward 2- and 4-year terms for legislators and 4-year terms for Governors and without, evidently, much disruption of the governmental process—indeed, I would say, to the great benefit of the governmental process.

So, we have some interesting grassroots precedents for this kind of change, precedents that make it less threatening. But it does have profound implications, because it does raise—as Professor Sundquist has suggested—the need for lengthening the congressional term to 4 years to make it congruent with the Presidential term because, obviously, we can't have the Presidential and congressional candidates—House of Representative candidates—running on a joint electoral ticket unless they have the same terms.

I think here a lot of imaginative thinking is possible, in terms of the possibility of a staggered 8-year term for Senators, for example, so that in all cases Senators would be coming up for reelection, or senatorial candidates would be running, at the same time that Presidential candidates were running.

So that if we were able to make even this relatively moderate change, compared to the sweeping parliamentary alternative, at least it seems to me we would be going back to the proposition that I started with; that we Americans think we believe in majority rule; we established a somewhat majoritarian system.

It has been crippled in operation, but that if we could go back to the idea of the double system of representation itself and link those two forms of representation more closely in the Presidential and legislative systems, we would do much to restore proper majority rule in this country and at the same time to protect minority rights.

Representative **Reuss**. And your double system of representation, again, has to do with majority rule, but minority protection by our Bill of Rights?

Mr. **Burns**. I use the term "double representation," meaning executive representation through the election of Presidents, that is, through the electoral college, on the one hand, and the matching legislative system of representation through the election of Senators and Representatives on the other.

And I am suggesting that the more those two forms of representation could be combined, the more we would reestablish majority rule, because in combining those two forms of representation, for example, through the 4-year term of Representatives concurrent with the Presidential term, in doing that we would both strengthen majority rule and we probably in the process would get rid of some of the antimajoritarian devices that still operate in the system, such as, say, the filibuster in the Senate, excessive power of seniority in both Chambers, and other processes that to my mind give excessive protection to minority rights, beyond the legitimate protection of opposition rights to speak out, protest, and the like, in the Bill of Rights.

Representative **Reuss**. Thanks to all the witnesses. Needless to say, I have a number of questions.

SHOULD THE CABINET INCLUDE MEMBERS OF CONGRESS?

Let's start out with Mr. Burns and his first specific proposal; that is to say, bridging the present gap between the Congress and the Executive by permitting Senators and Congressmen to sit in the Government, in the Cabinet, a proposition which I have flirted with myself through an amendment to permit it.

How do you answer Hamilton in the Federalist Papers, who defended the present constitutional provision that a legislator may not sit in the Cabinet or the Government, may not be a public official of the executive branch, by saying this would give the President an opportunity to appoint toadies and subservient people from the legislative and would give him an unfair advantage.

If I misquoted Hamilton, tell me, but I think that was the burden of what he said.

Mr. **Burns**. That certainly was a prevailing worry on the part of the framers. I think the answer to that is to put the framers in their particular intellectual era.

They were living at a time when that kind of executive behavior in monarchies as well as republics was one of the things that had most outraged good republicans, and that kind of executive and monarchical influence is exactly the kind of thing they wanted to get away from in their young Republic.

It seems to me to answer that, that there is a world of difference between what could happen in that day and what had happened in various monarchies and dictatorships and even republics in that day, as compared to what would happen today with inappropriate choices on the part of the Executive.

We do have a press that is exceedingly alert to that kind of threat. It would be very disadvantageous to the President to choose toadies and incompetents, just as it is today for him to do so in his Cabinet.

So it is very hard for me to transpose that great worry of 1787 into a major worry for 1982.

Representative **Reuss**. Throughout my questioning, incidentally, if any other member of the panel would like to be heard on that question, just get my attention.

CAN PARLIAMENTARY ELEMENTS BE GRAFTED ON OUR GOVERNMENT?

Mr. **Sundquist**. Mr. Chairman, I would like to comment on that particular proposal. It troubles me for perhaps a different reason than it troubles Jim Burns.

And it illustrates the difficulty of taking one feature of the parliamentary system without taking the whole thing in all of its elements, which obviously is not quite within the range of conceivability.

The problem with putting Members of Congress in the executive branch, it seems to me, first, is a matter of workload. The independent legislator in this country has developed an enormous legislative and constituent service load that in the parlimentary countries the legislators don't have to carry.

I think any committee chairman on Capitol Hill will testify—I am sure you will—that being chairman of a committee is more than a full-time job. If you were handling that job and also trying to run a Cabinet department, it seems to me that would be beyond the capacity of any human being.

The second difficulty is that of getting individuals who would both have the President's confidence, and hence be able to participate in the unified executive branch and also carry the weight that this proposition assumes they would carry on Capitol Hill.

When we have a divided government, as we have had more than half the time since 1954, you would presumably have members of the minority representing the Congress in the President's Cabinet. Whether the members of the minority would carry the kind of weight in the legislative branch that as this proposition supposes is certainly doubtful.

Even when the majorities in Congress and the President are of the same party, you have personality clashes and policy clashes. Take, for example, when President Johnson was President and Senator Fulbright was chairman of the Senate Foreign Relations Committee. If the President were required under this proposition to have the chairman of the Senate Foreign Relations Committee as Secretary of State, the Government obviously wouldn't function very well, because the President and Secretary of State would not have mutual confidence.

On the other hand, if the President could pick his own Member of the Senate to be Secretary of State, it would be someone who would not be chairman of the Senate Foreign Relations Committee, presumably some junior Member, and he would not carry the required weight nor have the necessary position of prestige and leadership on Capitol Hill.

Despite all these objections, it seems to me it would be advantageous to have the prohibition removed from the Constitution so that it could be experimented with and see how it would work. While I have misgivings as to how it would work, it would be useful to try it in a case or two and see what happens.

Representative **Reuss**. Your presentation, Mr. Sundquist, of the four categories of possible constitutional changes magnificently demonstrates what you have just said: namely, that it is a seamless web, and when you start suggesting one way of improving, you are led to one and another and another and another.

In your presentation on the four sets of possible constitutional changes, you were not deterred, I believe, by the fact that many of them are quite radical; that is, you want to set down some of the options without necessarily at this time endorsing any of them, but you were trying to present a fair set of possibilities.

Is that a correct perception?

Mr. **Sundquist**. Yes, that is correct.

WHAT WOULD BE THE ROLE OF THE U.S. SENATE?

Representative **Reuss**. Why is it then that you and others are really quite tender toward the U.S. Senate?

I point out that in almost every other democracy in the world, the upper house—the French Senate, the Bundesrat, the House of Lords—has been shorn of powers anything approaching those of the U.S. Senate.

I point out further that in our State legislatures—while all of them except Nebraska do have a Senate—by constitutional interpretation Senators are elected on the basis of one person, one vote.

Why shouldn't those who are starting now to examine our constitutional system wonder out loud whether it might not be feasible or desirable within our Constitution to somewhat change the character of the Senate?

Sure, preserve its treatymaking power, its appointment-approving power, its consult and advise power generally, but require that its legislative powers be somewhat curtailed, either in quantity or in the time it is allowed to act, a delaying function perhaps.

Would there be anything in the inherent nature of the Union, something that would prohibit taking a look at that?

Wouldn't such a change make somewhat easier some of these problems of staggered elections and executive-legislative bridging you have described?

I know it is a big mouthful, but what about it?

Mr. **Sundquist**. I think you are right that there is an omission in the list, and it has been called to my attention before. The possibility of a unicameral legislature ought to be in that list, except I believe the Constitution cannot be amended in that one particular. No State can be deprived of its representation in the Senate without its consent.

Representative **Reuss**. The question, though, is what representation. Does it have the right—does each State have the right to send a filibuster——

Mr. **Sundquist**. The functions of the Senate could be altered by constitutional amendment. In compiling that list I tried to disregard the question of feasibility, because if you allow the possibility of enactment of something like this to enter your head, you get discouraged about making a list at all.

Our constitutional amendment process is so cumbersome and requires such a high degree of consensus in the country that the likelihood of any serious change being adopted is quite remote.

As Professor Burns said earlier, it would require a kind of crisis that we haven't had in a long time before any drastic measure could be considered.

So I left it out, I suppose, because it seemed on the far edge of feasibility, considering that constitutional amendments have to be for practical purposes initiated by the Congress, and it is hardly conceivable that the Senate, by a two-thirds vote, would adopt anything that would diminish its own powers.

Representative **Reuss**. There happen to be no Members of the other body present here this morning, so I do not plan immediate action. [Laughter.]

Mr. Hermens, maybe you could comment at this point. What can you tell us of the decline of upper Houses throughout the democratic world? What became of the Bundesrat, the upper House of the Austrian Kingly and Imperial Empire, that of the Holy Roman Empire, that of the United Kingdom and France? They seem to have trimmed them back a bit over the centuries.

ROLE OF THE UPPER HOUSE IN PARLIAMENTARY GOVERNMENTS

Mr. **Hermens**. In English history, the one with which we are all most familiar, the power of the House of Lords receded in the course of history, but the upper House still plays a useful part.

It enlarges the reservoir from which the elite of British leaders can be selected, ultimately into the Cabinet. Then the Lords are a useful instrument of correction and reflection. Technical details of legislation can be examined in order to iron out what does not fit in. The Lords contains a number of lawyers who are very good at this. Then there is the suspensive veto. It has the purpose that the government and the House of Commons ultimately do what public opinion really wants them to do.

In most countries with a parliamentary system developments have gone in the same direction. In France, the Fourth Republic went so far in restricting the rights of the Senate that at first it deprived it even of its name, calling it "The Council of the Republic." The constitution of the Fifth Republic attempted to make the Senate into a second chamber with real rights, but subject to provisions making sure that, in the end, the will of the Assemblée Nationale would prevail. General deGaulle discovered soon that the Senate insisted on its rights more than he liked. He initiated a referendum by which the Senate was to be "reformed" virtually out of existence. He lost the referendum and resigned. During the following years the Senate, with its non-Gaullist majority, always presented problems to the government although a more amicable relationship was established. So far it has continued under François Mitterrand. The Senate has a non-Socialist majority, but uses it with caution, aware of the fact that even in Socialist hands the Gaullist constitution can be used to eliminate anything which might go in the direction of obstruction.

Republican Italy has a constitution with "perfect bicameralism" and this constitutes one of the sources of trouble for the government. The composition of the Chamber makes it difficult to assemble a government. Thus Mr. Spadolini had to glue five parties together. In several of the parties, in particular the Christian Democrats and the Socialists, he also had to contend with a variety of factions, the so-called "correnti." The Italian voter can, in Chamber elections, vote under a double system of proportional representation. First the seats are distributed according to the votes for the various parties. Then the seats attributed to a particular party are assigned to individual candidates on the basis of the preferential votes which they have received. The "correnti" try so hard to secure as many preferential votes for their own candidates as possible, and they sometimes seem to be a more important factor in the elections than the parties themselves. They continue their work within the Chamber and every Prime Minister has to be careful about satisfying them as much as their party.

After all of these hurdles have been taken the new government must be approved by the Senate as well as by the Chamber, and it can also be overthrown by the Senate. The government's parliamentary work has, therefore, to be done twice. The life of Italian Government would be a little easier and might last a little longer if this situation did not exist.

In Germany the Bundesrat is an organ of the governments of the Länder and does not vote the Federal Government up or down. it was intended to reflect the practical experience of the Land governments and of their knowledgeable civil servants who were to influence policy in the direction of objectivity and continuity.

Actually, the Bundesrat has become a powerful weapon of the political parties which control it. If the majority of the votes is held by the opposition the Federal Government has extra problems. This has happened to Konrad Adenauer and Ludwig Erhard as well as later to Willy Brandt and Helmut Schmidt. All of them had to face certain difficulties even if the opposition did not have a majority of the Bundesrat's votes. Helmut Kohl started out with a majority of the Bundesrat on his side, but took measures immediately to foster a cooperative relationship with it and its committees. Many observers feel, however, that while the Federal Government may consider the Bundesrat at times annoying, that body's existence makes possible a kind of constructive input by the Länder which could not be secured in any other way.

Could the United States combine perfect bicameralism more or less on the present model, with parliamentary government? A number of arrangements, which cannot be detailed here, could be adopted to alleviate the difficulties inseparable from such a case. At this juncture suffice it to point out that even if nothing were done the government would have an easier time of it than its Italian counterpart because the Members of the Congress are elected by majority vote, and, as a result the bulk of the Members are true moderates.

In the Italy of 1982 the Socialist leader, Bettino Craxi, and Prime Minister Spadolini were aware of the trouble caused by proportional representation in general, by the preferential votes in particular and also of the secret vote which makes it possible for groups of deputies, the so-called "franco-tiratori," free-shooters, to vote contrary to their own party's decisions, without their names being known. Craxi was strongly in favor of institutional reforms but the customary combination of vested interests and of the intellectual confusion dim the prospects of reform.

In conclusion a few remarks on methodology. The chairman has aptly called the essential parts of our system "a seamless web," and both James Sundquist and James Burns have argued persuasively in the same manner. We can, indeed, not simply select any part from an entirely different system and graft it on our own. The parliamentary system is geared to force the executive and the legislative into cooperation, and its successes are due to that fact. Our own system, in the attempt to assure political freedom, seems to cause the various powers to assume positions of mutual antagonism.

Each system has its own dynamics and these dynamics will condition the effects of whatever part of one system is introduced into the other. Still, our deliberations have been guided by the assumption that, in particular in view of the tasks confronting us in the 1980's and beyond, our system is not sufficiently cooperative, and therefore not sufficiently effective. As Charles Hardin indicates in the title of his book, there is also a deficiency in accountability.

In such a case it would be logical to consider a reform of the system—changing the one for the other—rather than changes within the system. Woodrow Wilson took the first path in his earlier writings and, as Arthur Link has pointed out, he never gave up his preference for cabinet government, though in later years he was hoping for a specific American way of introducing and operating it. More recently Henry Hazlitt went in that direction. Charles Hardin, preoccupied, on the basis of personal observation as well as of theoretical reflection, by the need to combine "Presidential power and accountability" concentrated even more strongly on ways to combine some of the old with the new.

Henry Hazlitt made one particularly helpful suggestion: Try the parliamentary system first in one, or several, of the States. On the State level some of the objections raised against cabinet government on the national scale simply don't apply. On the other hand, a look at what happens in some of our States, in particular during the weeks preceding the adjournment of a biennial legislative session, tends to confirm Hazlitt's view that the parliamentary system is the one which is a truly appropriate tool for the businesslike behavior which characterizes American endeavors in other areas.

Most of the current criticism of the parliamentary system is based upon a perception of foreign experience in regard to which one can only quote Walter Lippmann's dictum: "We do not first see and then define. We define first and then see." Nothing could do more to correct such perceptions than genuine experience with parliamentary government gained on American soil.

Matters being what they are we shall not have that experience for a good while, so we must consider the possibilities of reforms within the system. Some of them are counterproductive, as so many changes made in the postwar years have been; they are either nullified by the dynamics of our system or converted into forces accentuating the centrifugal rather than the centripetal.

Actually, some reforms can be adopted without amending the Constitution. Extensive work is being done now on the mode of Presidential selection. If we are frank with ourselves, we will admit the negative effects of the popular primary and of other reforms both of the progressive era and of recent decades. Packages incorporating the best available alternative could be assembled.

Then there are the opportunities offered by limited constitutional amendments. Thus the Framers never expected Presidential electors to be selected in a combination of popular elections with the unit vote. Most of those who reflected on this matter thought of choosing one elector per congressional district and two at large for each State. Recently the proposal was made to complement this with a premium for the candidate with the highest national plurality.

A third group consists of plans for reforms with a possible incremental effect. A first breach in the wall of our particular type of separation between Executive and the Congress could make it easier to open up others. Thus Congressman Reuss renewed the proposal to let Members of Congress serve in the executive. In our own midst James Sundquist has proposed a coupling of elections for different Federal offices—which aims at applying a brake to at least some of the centrifugal forces in our system—and James Burns has drawn on some of the lessons derived from his wide-ranging research for a critical evaluation of this and other plans. Last, a recent weekend meeting of the Committee for the Reform of the Constitutional System has produced what, as of now, is just a very useful laundry list of possible reforms but what, with proper attention to what John Jay called the absolute necessity of system, can become the basis for assembling one or more serviceable packages.

Typical patch-work changes are another matter. Patches can be useful when applied to the right place in the right manner. But that may well not be the case with what is now the most popular reform proposal: extension of the Presidential term to 6 years. Where is, in that case, the systemic regard for enhanced congressional input and cooperation, as well as for improved Presidential accountability?

The hearings initiated by our chairman both in January 1980 and now in November 1982 point to the only constructive solution which aims at giving the people an option between genuine packages combined with an impartial presentation of the evidence for and against.

Representative REUSS. Thank you very much.

CONGRESSMEN IN THE CABINET—PROBLEM OF WORKLOAD

Mr. Burns, in discussing the wisdom of permitting Senators and Congressmen to sit in the Cabinet, you pointed out that there is a question of congressional workload, and that Congressmen are already quite busy.

Is it not a fact, though, that much of the congressional workload is make work and busy work brought about by the kind of ambitious and energetic people who, happily, one gets in Congress. There really isn't enough majestic policymaking, not enough positions of importance under our existing system to go around, and hence, Congressmen are forced to send out endless inane questionnaires, the answers to which are not really of interest in themselves.

Congressmen carry on endless computerized correspondence with endless special interest groups, who also use computers to fix up the letters to the Congressmen.

Congressmen conduct blood pressure tests of their constituents in shopping centers in a manner never envisioned by Thomas Jefferson or, for that matter, by Oliver Wendell Holmes.

Mr. **Burns**. Mr. Chairman, I did not make that argument about workload. Mr. Sundquist made that argument, and I wanted to rebut him with the very words that you have used, but I was not going to sit in front of a Congressman and make the kind of statement that you just made, even though I thoroughly endorse it. That has been my view. It is make-work. In my view, there is a gap of political responsibility and participation decisionmaking in Congress, and on Jim Sundquist's supposition, it is precisely because there are not weightier matters on them that Congressmen naturally gravitate into this whole orbit of errand running and the kind of things that you have described so eloquently in your question.

I would go beyond that, Mr. Chairman, and say that I further disagree with Mr. Sundquist, because of all the problems of parliamentary systems, the problem of being both a legislator and a member of a ministry or a cabinet is not very severe. I am sure they all grumble about—I know the British Cabinet members that I talk with grumble about—the need to be in Parliament for long hours and then go back and try to run the department. But the way they set it up, of course, in Britain, is that they have responsible people to run the department, and as you suggest, responsible people to help out in the legislature.

But on a more positive side, I do think that out of Mr. Sundquist's statement of a little while back comes a very important point that I would like to pursue, and that is, on the two major suggestions that I endorse—that is, the Reuss bill, and the collective or united electoral ticket—I advanced those separately but I think on his proposition, those would have to be combined.

I think the joint ticket idea, in short, is a very natural counterpart to the Reuss proposal for congressional representation in the Cabinet.

Representative **Reuss**. Mr. Sundquist, would you address yourself to what Mr. Burns has just said, and also tell us what you think about the workload of the Congressmen today?

Mr. **Sundquist**. I am inclined to defer to a Member of Congress on the question of workload. If you feel, from your experience, you could be chairman of a committee and be a Cabinet member at the same time and discharge both jobs satisfactorily, I am not inclined to quarrel with you. I think, though, that would depend greatly upon whether the Member has a safe district. In the parliamentary system, a cabinet member normally does have a safe district. But if he loses an election in one district, they give him a better district somewhere else, and he gets elected and then becomes safe. We don't have that tradition in this country. You have to live in the district. And your constituents there will decide your fate.

I think that in a closely contested district the Member of Congress finds this busy work absolutely indispensable. I recall when the Commission on the Operation of the Senate raised the question with Senators in interviews and questionnaires, as to whether they couldn't be relieved of a good deal of their work if an ombudsman was established—as many countries in the world, some 70, now have—the response we got was: "Not on your life. The constituent service that we perform by acting as ombudsmen ourselves is of infinite value when we come up for reelection." It may be makework, but it creates a great political capital, and I think the Members would be loath to give it up.

But I do think the other question is more serious, and that is how you would get a person who carries real authority in the legislative branch appointed to the job and carry true authority with the President at the same time. You can do that in a parliamentary government. In our system, where the two branches have separate constituencies, it becomes more difficult to visualize.

CONGRESSMEN IN THE CABINET—WHICH ONES?

If the rule were established that the President could—or in the case of your bill must—appoint Members of the legislative branch to executive positions, then the question arises, which ones?

What happened in Britain is that the Parliament, in effect, said to the King, "You've got to take the ones we give you." Now that could very well happen here. The Senate could establish the practice of simply not confirming an appointee to a Cabinet position unless he or she was the one selected by the Congress itself. If the appointee were selected by the Congress itself, they might or might not fit well into the executive branch, and the unity of the executive branch would ultimately be destroyed.

If, on the other hand, tradition were established that the President would choose, as somebody put it earlier, his own "toadies," they would not carry the influence on the Hill, that would make the whole thing worth attempting.

I think Mr. Hermens had a constructive suggestion that deals with the workload problem, at least, that when the Member of Congress took the job in the executive branch he would be replaced by someone—someone of his choice, I suppose—in the seat that he vacated. But that wouldn't change things very much, because the member of the Cabinet, as in France, would no longer be in the legislature, and the purpose of the reform would be vitiated.

Representative REUSS. You ended up your observations about the wisdom of a constitutional amendment repealing the present prohibition on Members of the Congress serving in the Government by saying that it might be worth a trial.

At least I recall your saying something like that.

Mr. SUNDQUIST. Yes.

Representative REUSS. I would just say that if it is tried, it certainly should be up to the President as to who from the legislature he wanted, if any. I don't think it would be a good idea to let the Congress forward its slate and make the President force himself to take that.

Second, I would think it would not be wise, although it would be within the limits of his discretion, for the President to appoint to a Cabinet or governmental post a committee chairman or one he wants to continue as a committee chairman, because that would present a real conflict of interest, which would carry us, in my judgment, too far away from the Presidential system, which I certainly don't want to displace. So that a wise President probably wouldn't appoint Representative Rostenkowski Secretary of the

Treasury, if Congressman Rostenkowski wanted to stay on as Ways and Means Committee chairman.

OMBUDSMAN ROLE OF MEMBERS OF CONGRESS

A third observation I would make about this ombudsman function of the Congress is this. You're certainly right that Congress—and I know this from personal experience—is not about to give up the enormous ingratiating function it has, through acting as an ombudsman for constituents, and I don't think it should.

So in the idea of ombudsman, I have always in my formulation left the Congressman on top, and the ombudsman as sort of an additional branch of the Congress.

However, we may be paying a price in our system for keeping the Congressman as the main Robin Goodfellow of the Federal system, the fellow who sees that a constituent is done justice to, because—in my observation, and I would welcome your telling me to the contrary, because you have served a long career on Capitol Hill—in my observation, because the Congressman is there standing in the wings as an ombudsman, many executive branch civil servants tend to be rather lethargic, unimaginative, and not too accommodating, thinking that, "Well, when we hear from the Congressman, that will be time enough to turn somersaults."

As a result, the heads of departments and their subordinates don't really make superlative service to the citizen a major goal of life. I don't find the Secretary of HUD going out to the HUD regional offices, as the Emperor used to walk among his citizens at night, seeing how the people in region VII are dealing with local officials, builders, citizens, and others.

I don't see the Secretary of Human Resources sitting in a local social security office and seeing whether the services given are perfunctory or humane.

I think one of the reasons you don't see much of that is because, under the present system, the Congressman takes care of that, but the Congressman, in effect, would probably take care of only about 1 in 100 pathetic cases who need help. The others he doesn't know about.

It's like public housing. It's great if you can get it, but the other 99 percent of the people are unserved.

Mr. SUNDQUIST. I certainly agree with the point that for the Congressman to perform the ombudsman function stimulates much better service out of the executive branch than it would otherwise perform. If the Cabinet members don't personally go out to see how things are done, they presumably have inspectors general, agents and staff members who do that part of their jobs for them, to keep them informed.

CONGRESSMEN IN THE CABINET—FURTHER DISCUSSION

I would like to come back to your point about Representative Rostenkowski, though, because that illustrates the dilemma I was trying to bring out. If you assume that the Secretary of the Treasury would not be Congressman Rostenkowski but would be some back bencher or junior member of the Ways and Means Committee or someone not even on the committee, you would set up an automatic clash between Congressman Rostenkowski and whoever was attempting to unify the Government in the field of taxation policy, or whatever it was. I would think that the committee chairman who was not chosen would find himself impelled to preserve his own status and prestige by undermining the man who was chosen. And the staff certainly would be so minded. They would be on the chairman's side. You would, I would think, exacerbate the clashes that now exist.

I took it for granted in your proposal that you did have in mind that the person whom the Congress itself has chosen to be its leader in a given field by making him or her chairman of a committee would automatically be the person to take those responsibilities in the executive branch. If you divide them, then you have set up competition and conflict from the outset.

Representative **Reuss**. You are certainly right in the point you have just made. I would point out, of course, that many of the parliamentary systems of Europe—I think of the Federal Republic of Germany, and of the United Kingdom too, but there are many others—have been moving toward stronger committees in their legislatures. For long, their committees were nonexistent or negligible, but now they are feeling their oats a little bit and getting committees and chairmen who actually seem to think they've got something to say. So they are moving in a Congressman Rostenkowski type direction.

I would think, again, that this problem you describe, and it is a very real one, could be solved by commonsense. A President confronted with a situation—I have thrown Congressman Rostenkowski's name into this discussion, to use him as an example—if he is going to appoint somebody from Congress as a Secretary of Treasury, should probably appoint somebody who is congenial to Congressman Rostenkowski, not personally offensive, and you find that out quite quickly by talking to the principals.

So I think it is soluble, but you are surely right that it does present a problem.

Mr. **Sundquist**. To come back to your point, I would like to see it tried, just to see how it would work out. You have still another complication, a person who has influence in one House of Congress doesn't necessarily have influence in the other. We do have a bicameral system, and there would be competition between the two Houses to see who got which post in the executive branch. The one who didn't get the post would become, in some cases perhaps, an automatic enemy of the man who was appointed.

Representative **Reuss**. If you should decide this linkage of the Congress and the executive, having Congressmen serve in the Cabinet, is the way to go, then maybe you would end up in desperation with the "Nebraska-ization" of the U.S. Senate, which would take some doing, this illustrates the point which you have made many times, that little changes, before you are through with them, sometimes result in very large ones.

Mr. Burns.

Mr. **Burns**. I think Jim Sundquist has taken a very hard-headed approach to this question, and I think we are coming very close to totally engaging on this, but I think to some extent he is offering us a "parade of imaginary horribles."

I would go back to your one word or two words, "common sense." First of all, we would have to assume that a President dealing with congressional leadership would understand the very types of pressures, problems, jealousies, divisions, and unities that we have been talking about here.

The second thing that I think Mr. Sundquist has left out is the collective aspect of this proposal. Very important in this proposal would be the idea that a number of people would be coming out of Congress into the executive—while keeping their ties with Congress—and there would be a kind of executive weight in Congress, and at the same time, a kind of legislative weight in the executive, so that we are dealing with a number of bodies that might collectively have that kind of unifying role that we are talking about.

But beyond that, I think the last part of your point is very important and should be emphasized, and that is, once the incremental changes, such as this might represent at first, attain momentum, on the seamless web theory there would be all sorts of implications for change in the future. This is where I think Jim Sundquist is quite realistic in his assessment of it, that once the idea of more unity between the legislative and executive branches is established as a desideratum.

Once the idea of a joint effort is accepted, then there will be all sorts of other implications for change in the two branches, the relations of the two branches of Congress to each other: the question of so-called vetos or veto traps in the two Houses of Congress; the implication for early legislative input into executive decisionmaking, instead of coming to Congress, after the executive types have drawn up their plans; the possibility that in recognizing certain Members of Congress for a national legislative-executive role, then the President is not just adding somebody to that unified effort, he is singling this person out and automatically raising this person in the esteem of the Nation and probably in the esteem of his or her constituents.

To be sure, realistically, there will always be next year's primary election opponent who will charge that so-and-so has neglected his people, he has fallen down on errand-running and the like, and this is where we get to the question of how this kind of a change might produce a change in the whole constellation of leadership in this country.

If a change like this were made, in my view, it would begin to so recognize the legislator that the President has elevated that it would start a shift toward the creation of a much more conspicuous, much more effective and much more unified executive-legislative leadership corps in the country, so that it would be an honor to be part of it. Assuming of course that the President does not defy Congress in making his appointments to this Cabinet, the impact of these people in Congress, as well as in the executive, could start those shortrun changes that could very easily lead to profoundly important longrun changes.

Representative REUSS. Which perhaps is a good point at which to end this fascinating discussion.

We are most grateful to Mr. Sundquist, Mr. Hermens, and Mr. Burns, for a tremendous contribution.

These hearings have been useful. I am confident that the published volume of hearings with extended comments and an appendix will be a good interim document.

I am grateful to each one of you gentlemen.

The committee will now stand in recess until Thursday, December 16, 1982.

[Whereupon, at 11:50 a.m., the committee recessed, to reconvene at 10:35 a.m., Thursday, December 16, 1982.]

POLITICAL ECONOMY AND CONSTITUTIONAL REFORM

THURSDAY, DECEMBER 16, 1982

Congress of the United States,
Joint Economic Committee,
Washington, D.C.

The committee met, pursuant to recess, at 10:35 a.m., in room 5110, Dirksen Senate Office Building, Hon. Chalmers P. Wylie (member of the committee) presiding.

Present: Representative Wylie.

Also present: Charles H. Bradford, assistant director; Bruce R. Bartlett, deputy director; Chris Frenze, professional staff member; and Louis C. Krauthoff II, assistant director.

OPENING STATEMENT OF REPRESENTATIVE WYLIE, PRESIDING

Representative Wylie. Good morning. The meeting of the Joint Economic Committee will come to order.

Senator Jepsen, who was scheduled to chair this hearing this morning, is involved in some amendments on the Senate floor and asked that I come over and start the hearings. He wanted your statements in the record and your testimony to sort of balance the record on this issue of political economy and constitutional reform and I think what we might do is suggest to you that your statements will be made a part of the record in full. They have been submitted to us and we are glad to receive them. I think what we'd like for you to do is to summarize what you have in your statements in about 5 to 10 minutes, depending on how you feel about that.

So with that, I'd like to start the hearing by asking Mr. William Niskanen, with the Council of Economic Advisers, if you would please summarize your statement.

STATEMENT OF HON. WILLIAM A. NISKANEN, MEMBER, COUNCIL OF ECONOMIC ADVISERS

Mr. Niskanen. Yes, Congressman. My apologies for being late, along with the economic recovery. My prepared remarks address the four major concerns that have been raised about the proposed balanced budget tax limitation amendment. With your permission, I would prefer to submit these remarks for the record and address somewhat more general issues.

Representative Wylie. Permission granted.

Mr. Niskanen. My remarks this morning should be recognized as personal conclusions and not necessarily representing the position of the administration on these matters. These remarks are drawn from my own work in this area and my own reading of the developing body of public choice literature.

I want to address this morning two major issues that bear on the institutional biases in our present political system as they bear on the decisions concerning the level and composition of federal spending and, second, on the choices between taxes and borrowing to finance that spending.

It is first important to define services that the Federal Government provides that are best described as public goods in which the benefits accure to everyone. By and large, these consist of programs that contribute to, in the language of the Constitution, the common defense and the general welfare. In addition, there are private goods where goods and services are provided that accrue to selected groups and are often called special interest programs.

These categories, of course, are not absolutely distinct. Some special interest programs may contribute to the general welfare that the larger community values, the well-being of the recipients of those programs, or it induces behavior by those recipients that is valued by the larger group.

For this discussion, however, it is worthwhile to preserve this distinction between public and private goods provided through the Federal budget.

For public goods, there is no clear bias in the manifestation of demands by voters that would directly lead to either higher or lower spending that is in some sense appropriate. This depends very much on the relative income distribution of the demand for these goods and of the taxes that are paid.

If one assumes, for example, that the median voter is from a family or is an individual with a median income, you find that the tax share of voters with a median income or below in the United States right now, the Federal tax share, is about 17 percent. In other words, the lower half of the income distribution pays about 17 percent of the combination of Federal income taxes and social security taxes. Those two tax sources constitute about 80 percent of total tax sources. The major remaining sources include excises which are moderately regressive and the corporate income tax which is rather strongly progressive, so the 17-percent share is probably a more or less accurate representation of the total tax share borne by the lower half of the income distribution.

I think it is plausible that the sum of the marginal benefits of these general public goods like defense and other such goods that are borne by the upper half of the income distribution is roughly equal to the share of the taxes that they pay, but there is no direct evidence that bears on that because we do not have direct evidence of the personal and group demands for these Government services. But in general I think that one cannot conclude from either theory or the available evidence that these public goods in general are either oversupplied or undersupplied in terms of the demands that are represented here in Congress.

There is a concern, however, about the effect of the internal Government decision process on the supply of those goods. For the most part, the agenda is set by the combination of the supplying bureaucracies and the special authorizing and appropriations committees. The incentives of these two groups for the most part is to lead to a higher level of spending than would be consistent with the interest of the majority of Congress as a whole. This process may lead to a higher level of spending even for these public goods than is preferred by the representative of the median voter. An example here may be worthwhile.

If, for example, the authorized level of spending for a particular service would provide, say, 95 units of that service, the median voter would agree to a level of that service of 100. The bureaucracy and the specialized committees that set the agenda may very well propose a program at a level of, for example, 104, in which case the representative of the median voter may still prefer that to the existing or authorized level, but it would lead to a higher level of spending in that area than he would himself prefer.

In general, I think one may conclude that the difference between the present authorized level and the level that is likely to be approved may be up to twice the difference that is preferred by the representative of the median voter.

For the wide range of private goods and services supplied through the Federal budget my conclusions are somewhat stronger. In a world in which everyone paid the same absolute amount of taxes and private goods supplies through the Federal Government are decided by majority vote, one would expect that the majority would expand these programs to the point where the value of these programs are to the affected group only 50 cents for every dollar of spending for those programs.

Given that the actual taxes paid by the lower half of the income distribution is only about 17 percent of total tax revenues, there would be an incentive for the majority to expand these private goods and services to a point where the value to the majority itself is equal to only about 17 cents for every dollar of spending.

This process in some ways is similar to the consequences of averaging one's bill in a group attending a restaurant. It leads to a clear bias toward too much spending for these types of private goods provided through the Federal budget unless one of several conditions apply.

One condition that would reduce this bias would be if the Constitution itself rather severely restricts spending for such private goods. That was the original intent of the article I, section 8 restraints on the range of functions that are authorized to the Federal Government and reinforced by the very strong language of the 10th amendment.

Unfortunately, from my perspective, these article I, section 8 restraints are now no longer binding and our effective constitution now seems to permit almost any function being provided through the Federal fisc. I'm not confident that there's any meaningful way to put that genie back in the bottle to restore the types of functional spending restraints that are in our explicit constitution.

Another rule that would reduce this bias in the provision of private goods would be to require that if Congress approves such spending for such private goods that they must be available to everyone rather to just members of some targeted group. That may seem like, on its face, a way to increase total spending, but I think that the most likely consequence is that it would reduce total spending and the bias in spending for these kinds of measures.

Third, of course, is that a flatter tax system than the system we now have would also reduce this bias.

Let me now conclude briefly with a comment on the biases in our present institutional arrangements as it bears on the choices between taxes and borrowing.

It's important to recognize that borrowing or deficit financing basically shifts the burden of the cost of providing current Government services and capital spending from the present generation of taxpayers to a future generation who must at that time either pay higher taxes or have lower Government services.

I think there are very strong reasons to be concerned that the Government uses too short a time horizon. In other words, that it discounts the future cost of present actions at too high a rate. The primary reason for this, of course, is the fact that elected officials operate on a 2- to 6-year election cycle with some uncertainty as to whether they will be returned to office. That is a condition that has existed since the beginning of our Republic.

I think a more important recent condition that has developed is a substantial weakening of the influence of the parties in the American political system, as a consequence of the dominant use of primaries as a means of selecting candidates, the development of public funding for campaigns and so forth. The parties had been the primary institution that disciplined the behavior of individual representatives because the parties' interests are not served by actions that substantially bias these major fiscal choices.

One other consequence of what I regard as a substantial weakening of the party system most importantly in the last 20 years is that Congress I think is increasingly paralyzed as an effective institution for formulating and reviewing policy proposals. People, of course, in this building and in this audience are a better judge of that than I am.

I think that the primary measures that should be considered to reduce this institutional bias against too much borrowing, too much reliance on borrowing as a means of financing Government goods and services include the sort of constitutional amendment that the Senate approved last year and was nearly approved in the House which would not prohibit borrowing but would define a decision to borrow as a special decision which requires a super-majority vote.

Consistent with my earlier remarks, I also think that it would be valuable for a number of reasons to reconsider actions that would strengthen the party system both to give the institutional processes here in Congress a longer time horizon and I think also to substantially expedite the decision processes in this body.

With this very brief summary of my remarks, I would be pleased to respond to questions.

[The prepared statement of Mr. Niskanen follows:]

Prepared Statement of Hon. William A. Niskanen

The Balanced Budget Amendment

INTRODUCTION

In recents months, for the first time in 70 years, Congress seriously considered a formal change in our fiscal Constitution. The proposed Balanced Budget/Tax Limitation Amendment was approved by more than two-thirds of the Senate and by more than a majority, but less than the necessary two-thirds, of the House of Representatives. A reputable public opinion poll suggests that popular support for the two major provisions of this proposed amendment is even broader; this poll also suggests that those who strongly favor these provisions are many times those who strongly oppose. Among those who have expressed the strongest oppcsition to the proposed amendments are numerous public figures, academics, and members of the establishment press. I do not support a general principle that the majority, even a broad majority, is always right, although I am part of this broad majority in this case. Nevertheless, such broad support, I suggest, should induce the thoughtful supporters of the minority position to reflect on the basis for their opposition.

My remarks today address this group, in the hope that argument and evidence are still an important way for civilized people to resolve such issues. My remarks summarize the major concerns about the proposed amendment that have been expressed by this group and my personal response to these concerns.

THE PROPOSED AMENDMENT

First, it is appropriate to summarize what the proposed amendment would do and what it would not do. The three key provisions are summarized below:

1. Prior to each fiscal year, Congress must approve a budget statement in which total outlays are no greater than total receipts, unless three-fifths of the total membership of each House approves a specific deficit.
2. Total statement receipts for the fiscal year may not increase at a rate greater than the increase in national income in the last calendar yer ending prior to the beginning of the fiscal year, unless a majority of the total membership of each House plus the President approves a specific higher level of statement receipts.
3. Congress and the President shall ensure that actual outlays during the fiscal year do not exceed the statement outlays.

The proposed amendment, in effect, creates a presumption in favor of a balanced budget and a nonincreasing tax share of national income, but permits a super majority of Congress to override either or both of these restraints.

It is also important to recognize what the amendment would not do. It would not prohibit an actual deficit that arises from a shortfall of actual receipts below statement receipts. It would not induce Congress to use over optimistic economic forecasts, because statement receipts are constrained by the prior increase in national income and because actual outlays are constrained by statement outlays. It would not prohibit any planned deficit or planned increase in receipts or outlays that is supported by a broad majority in each House. The proposed fiscal rules are not inconsistent with the budgetary procedures now used by the Executive Branch and Congress.

CONCERNS ABOUT THE PROPOSED AMENDMENT?

The several concerns about the proposed amendment involve four general questions: Is it appropriate to include any fiscal rule in the Constitution? Is it desirable to include these specific rules in the Constitution? Could these rules be effectively implemented? And, would these rules create undesirable side effects? Each of these questions deserves a careful response.

1. Is it Appropriate to Include Any Fiscal Rule in the Constitution?

Some critics of the proposed amendment have asserted that it is not appropriate to include any fiscal rule in the Constitution. These critics usually cite Justice Holme's dissent in the Lochner case that "... a constitution is not intended to embody a particular economic theory... ." Giving the benefit of the doubt to the learned Justice, one wonders whether these critics have read the Constitution or the deliberations that led to the numerous fiscal and economic rules in the Constitution. The existing fiscal rules include the enumerated spending powers (Article 1, Section 8 and the 10th Amendment) and the limitations on federal and state taxing powers (Article 1, Sections 9 and 10 and the 16th Amendment). The major economic rules include the protection of contracts (Article 1, Section 10) and the rights to property (the 5th and 14th Amendments).

Any reading of the deliberations that led to the Constitution and the several amendments should lead to a recognition that each of these fiscal and economic rules was intended "... to embody a particular economic theory." There should be no doubt that the Constitution was designed to provide a strong but limited federal economic role, free trade among states, and the protection of private property -- however the intent of the Founders may have been changed by subsequent interpretation. On reviewing this concern about the proposed amendment, Antonin Scalia, a distinguished professor of constitutional law, concludes: "I find nothing in the proposed amendment that is incompatible, in form, structure, or technique, with the existing Constitution. I do not even find it novel in the general subject matter to which it is addressed." This first concern of the critics seems without merit.

2. Are these Proposed Fiscal Rules Desirable?

For some critics, the major substantive concern is that "the proposed amendment would restrict the ability of the President and Congress to respond to a domestic economic crisis with an appropriate mix of fiscal and monetary policies." The following attributes of the proposed fiscal rules should be recognized, whatever one's evaluation of the efficacy of fiscal policy:

- The proposed rules provide for an automatic countercyclical fiscal policy, without a special vote. The balanced budget rule would lead to an actual deficit when economic conditions are weaker than expected and an actual surplus in the opposite case. The tax and spending limit rules would lead to a 21 month lag between the rate of growth of national income and the rate of growth of federal outlays, a lag roughly equal to one-half the length of the average economic cycle.

- The proposed rules do not constrain the composition of federal outlays or receipts, thus permitting any composition that is perceived to be appropriate to the time.
- The proposed amendment does not constrain monetary policy in any way.
- The proposed rules constrain the opportunities for a discretionary fiscal policy only to the extent such a policy does not have broad support in Congress.

On net, the proposed amendment provides for a substantial continuing role for fiscal policy without a special vote and any fiscal policy that is broadly supported.

The critics have yet to join issue with the primary reasons for the proposed fiscal rules. Supporters of the amendment contend that our effective fiscal constitution is now biased in several dimensions. First, there is reason to believe that the average deficit is too large, because the current elected officials do not adequately represent the interests of future taxpayers; this represents a political theory about the behavior of democratic governments, not an economic theory that a balanced budget is always desirable. The proposed rule that a statement deficit must be approved by a super majority is designed to offset this other bias in order to reduce the average deficit. Second, there is reason to believe that the average spending for private goods financed by the Federal Government is too high, because the distribution of benefits is more concentrated than the distribution of tax costs. Again, this reflects a political theory about the behavior of democratic governments, not an economic theory that increased federal spending is always wrong. The proposed rule that statement receipts and outlays may increase faster than national income only on the approval of a majority of the total membership of each House and the President is designed to offset this other bias in order to restrain the average increase in federal spending. The third rule, that actual outlays may be no higher than statement outlays, seems implicit in the concept of responsible budgeting.

3. Could the Proposed Rules be Effectively Implemented?

A third concern is that the proposed rules are unrealistic, that they could not be effectively implemented, and that "the proposed amendment assumes that budget planning is an exact science when all recent experience shows that there are many uncontrollable forces which affect federal revenues and expenditures."

As a long-term participant in the federal budget process, I question whether this concern reflects a careful analysis. The primary information on which the statement receipts and outlays would be based is the growth of national income in the prior calendar year; a preliminary estimate of this percent is available in mid-January and a revised estimate in mid-July. My expectation is that the second budget resolution would be based on this July estimate and would become the effective budget statement. This process would not be substantially affected by forecast errors. The rule that statement outlays may not exceed statement receipts would discipline pessimistic forecasts of receipts. The rule that statement receipts may not grow faster than national income would constrain the effect of optimistic forecasts.

The third rule, that actual outlays may not exceed statement outlays, would require some changes in the budget procedures. This rule could be implemented by one of two conventional budget practices: approval of a contingency fund as part of statement outlays to cover those increases in outlays that cannot be accurately anticipated, or the approval of a priority of outlays to be followed by the Administration should the pattern of actual outlays threaten to exceed statement outlays.

Some preliminary estimates suggest that a contingency fund of about five percent of total outlays would be sufficient to cover the largest amount of unanticipated outlays in recent years. Similar procedures have been used by State and local governments for many years.

4. Would the Proposed Rules have Undesirable Side-Effects?

A fourth general concern is that the proposed amendment would increase the pressure to use off-budget means to command resources, such as loan guarantees and private sector mandates. Such pressures are substantial under current budgeting procedures, and there is substantial merit to the concern that stronger fiscal rules would increase such pressure. Fiscal rules, however, are like a dam or a fence; they can be valuable even if they have some openings, because these openings can then be more closely monitored if the general barrier is effective. The political incentive to use loan guarantees is similar to the incentive to use deficits; both instruments command resources now at the expense of future taxpayers. Some additional fiscal rule affecting loan guarantees should probably be considered.

The problem of private sector mandates is more serious, because one could envisage mandates for employers to provide health insurance on pensions in lieu of federal program outlays. Sustained discipline of all federal regulations is necessary. Although the proposed amendment does not directly address this issue, the rule that statement receipts can grow no faster than national income would provide Congress with an incentive to stimulate real economic growth. The beneficiaries of federal outlays, thus, would have an increased incentive to discipline federal regulations that reduce real economic growth. In summary, I do not share the view that the proposed amendment should be opposed because it does not address all of the fiscal and economic policies of the Federal Government.

A CONCLUDING NOTE

Some of the critics of the proposed amendment apparently favor the implicit fiscal rules that have led to progressively larger deficits and a larger federal share of our national income. I have a fundamental disagreement with this group that is not likely to be resolved by further discussion. some of the critics, however, share the broad concerns about the results of the present effective fiscal constitution but oppose the proposed amendment on technical discussion. Some of the critics, however, share the broad concerns about the results of the present effective fiscal constitution but oppose the proposed amendment on technical grounds. The proposed amendment was carefully drafted after several years of deliberation, but some change may be desirable. As the proposed amendment is not likely to be approved in the remaining days of the current session of Congress, there is an opportunity to reconsider both the basic structure and the detailed language of the amendment. Your suggestions are welcome.

Thank you.

Representative WYLIE. Next, Mr. Aranson.

STATEMENT OF PETER H. ARANSON, PROFESSOR OF ECONOMICS, LAW AND ECONOMICS CENTER, EMORY UNIVERSITY, ATLANTA, GA.

Mr. ARANSON. Thank you. I've prepared a statement which I would like to have entered into the record and, with your permission, I'd like to read a summary of that longer statement.

This hearing seeks to discern why the Federal Government fails to promote the citizens' welfare and how constitutional change might make things better. Here I assess some of these proposals, but first we must agree on what the public sector should accomplish and on why it has failed. Only then might we identify standards for judging proposals for constitutional change.

In my view, consensus prevails among most economists and political scientists concerning which public sector activities are appropriate and which are not. For example, few scholars support subsidies for tobacco growers or regulations protecting trucking or other industries from competition. Scholars do applaud airline deregulation and similar moves. These judgments reflect a more or less coherent view of what we should and should not expect from the public sector. A summary of these expectations is helpful.

First, the marketplace may find it difficult to produce what economists call public goods such as national defense. Free-rider problems may plague production of such goods because we cannot withhold them from those who do not pay. Hence, we ask Government to supply these goods by enforcing an implicit contract through democratic decisionmaking and consent. Of course, only those public goods should be produced whose benefits exceed their costs. They should be produced in sufficient amounts and only by the level of Government at which they are consumed.

Second, we ask Government to suppress production of public bads, such as pollution. Since clear air and pure water are public goods they face the same problems of producing public goods. Similarly, public bads should be optimally suppresed by efficient methods at the appropriate governmental level and only if the benefits exceed the costs.

Third, reflecting its original function, Government should establish and protect rights to real and intellectual property and intangible assets.

Fourth, a more closely argued function of Government is the promotion of competition in the marketplace. Control of the monopolies, nevertheless, remains a widely regarded public sector function.

Finally, and again a matter that is closely and hotly argued, some scholars would use the public sector to redistribute wealth to the large public purpose of producing a public good in altruism, providing a safety net for those who cannot support themselves.

This brief description oversimplifies the matter. Different technologies exist for achieving each of these purposes. For example, in controlling pollution we might adopt command-and-control mechanisms or a regime of effluent charges, offset policies, and bubble regulations, which most economists prefer. Similarly, scholars disagree about how deeply Government should become involved in property rights. For instance, current thinking holds that rights in broadcast frequencies ought to be auctioned off and then left to the marketplace, not regulated by day-to-day interventions. Nor should Government create rights in transportation routes.

We need not settle here which of these functions is approprate or which method of execution would be best. We merely identify these functions and purposes and then show that our representative democracy finds it difficult to achieve them or to achieve them efficiently.

Now for several years I have examined the causes of the failure of public institutions to accomplish any of these purposes except accidentally. This research and my study of Government's actual operation persuade me that the ship of state requires a constitutional midcourse correction.

The civics-book view of representative democracy held that citizens formed preferences, say, for the production of various levels of public goods, that candidates acknowledged these preferences, incorporated them in their platforms, were elected, and carried out the electorate's mandate. Bureaucracies mutually administered the public's business, and courts protected constitutional liberties and "perfected" legislation. But this view has collapsed under the weight of reason and evidence.

First, the summation of the electorate's preferences remains difficult without political organization. Compared to the unorganized, an organized group, an interest group, if you will, can contract more reasonably with elected officeholders to make bargains at a lower cost, monitor and enforce compliance both by the group members and by the legislators, and anticipate the effects of proposed public policy changes. The general electorate enjoys no such capacity.

Second, groups use their scarce political resources to lobby only for programs providing private benefits, leaving the public interest and public goods unrepresented. This choice reflects a group's inability to collect payment for the political pursuit of public goods—those that cannot be withheld from other groups who did not contribute to this form of political action. Hence, private and public sector failures to create optimal levels of public goods are really identical phenomena. Groups thus pursue largely private programs, private goods, at collective costs.

Finally, if private programs were truly efficient, then organized groups would buy them in the private sector and sequester their political resources to pursue inefficient programs whose cost could be spread across all taxpayers.

The result is highly particularized legislation, the inefficient public provision of private benefits, and inappropriate public sector action.

Additional theories explain that the interest of legislators and bureaucrats perfectly overlay those of organized groups. Legislative process models in a deluge of case studies show that legislators enjoy a greater return from creating private benefits than public ones. Scholars of the Congress contrast universalistic, programmatic, and public regarding legislative action, the sort that fills up civic book descriptions, with casework of "pork barrel" and "particularized" legislation, the sort discerned in the view that is now conventional wisdom.

Studies of bureaucracy explain that administrative aspects of our democracy reinforce the public sector as a producer of private benefits at collective cost. For instance, with respect to housing programs, pollution control, and welfare, economists and many political scientists believe that self-enforcing and self-actuating programs, such as effluent charges and the negative income tax, are superior to command-and-control adminstrative arragements and would require a much smaller Federal payroll.

Not surprisingly, the agencies resist such proposals and as well join with constituency groups to promote the production of private goods legislation. George Will has characterized the resulting public policy conundrum with the elegantly mixed metaphor of "iron triangles rolling logs into pork barrels."

Groups often issue self-serving statements to show how their programs are in the public interest. More commonly, some public regarding program become so distorted as a vehicle for producing private benefits that it only remotely resembles its theoretical purpose. For example, every congressional manned bomber decision is judged in each congressional district by its impact on the local economy, not by its contribution to national defense.

More recently, the proposed gasoline tax has been theoretically divided up before it has been enacted, in a manner bearing no relationship to public purpose but bearing a clear relationship to a program of supplying divisible benefits. The largest part of EPA's budget is another example. It's not for pollution reduction but for construction expenditures in identifiable congressional districts.

Even when they struggle with larger economic problems, those who steer the ship of state guide it not to safe harbors but to rocky shoals. For example, how do we respond to high unemployment levels? We promote protective legislation for cyclical industries whose workers already earn a wage premium to compensate them for the cyclical employment. We subsidize the construction industry through tax rebates to new homebuyers. We subsidize a huge welfare industry of administrators and caseworkers. Employees in industries buffeted by foreign competition get direct relief in tariff protection or threatened tariff protection perpetuating a parochial disdain for the large comparative advantage. Public sector attacks on unemployment thus respond to group demands, not to the demands of the structurally unemployed who usually do not belong to organized groups. They go unserved.

How do we respond to high interest rates? Besides berating the Federal Reserve Board, which I think is a good practice to engage in from time to time, we promote regulatory bailouts for banking institutions and subsidies to the construction industry.

How do we respond to uncontrollable Federal deficits? To the extent that we do anything, we attack programs serving groups that are least well organized or capable of responding politically. Organized groups remain relatively unscathed. In sum, with regard to our larger economic problems, present legislative efforts bear no resemblance to a coherent economic policy.

The public treasury now resembles a common resource such as a public pasture, ambient air or water pollution. Since no clear property rights exist to these resources, people overuse them. The problem of rearranging our political institutions at a constitutional level, like the problem of reducing the overuse of any common resource, may thus be solved by finding a way to visit the costs of their actions on those who undertake them. That is, we must stop the cost-spreading and responsibility-shifting that characterize representative democracy.

Certain proposals for constitutional reform hold little promise. The first of these is for a parliamentary system with closer links between the executive and legislative branches. Proponents argue that a more unified government would be better able to execute decisive economic policy action. The analysis just reported reveals this proposal's more serious deficiency. It fails to solve the problem of enacting citizens' preferences for economic policy generally rather than merely the preferences of the well organized. In a unified parliamentary system some groups might go unsatisifed because a relatively smaller number of points of access, compared to our system's wide availability of access points, would make it more difficult for each group to get a hearing. But that reduction in points of access will create scale economies in political organization. So, groups will bind together in overall umbrella organizations to overcome the reduced opportunities for political access. A few very large interest groups will survive, perhaps one for organized labor and another for organized industry to compete for the collection production of divisible benefits but at a much larger scale.

This prediction, incidentally, exactly describes the British disease, the development of something akin to political class warfare. I do not recommend it.

Furthermore, existing parliamentary government has not had any greater success at executing decisive economic policy action than have we. Our relatively economic robustness may even reflect our government's inability to control the economy. A preference for "decisive economic policy action" by itself is no preference at all. It assumes that we can enact economic policy actions that make sense, but the Federal Government, even if we constituted it as a parliamentary system, cannot generate the kind of information responsiveness, and innovation that prevail in the decentralized marketplace. Decisive economic policy action would thus be a blueprint for decisive economic catastrophe.

A second set of proposals concerns presidential line item vetos and legislative vetos of agency rulemaking. Again, the framework reported here helps us assess these proposals. Each assumes that Federal intervention would decline if the respective veto power were adopted, but not such conclusion seems warranted. For example, a recalcitrant President could threaten an item veto of a particular legislative or mandated program to get the Congress to pass programs that he prefers. The result would be a kind of interbranch logrolling which could increase public sector size and intrusiveness. A legislative veto of agency rulemaking could create the same kind of incentives.

The worst problem is that these vetoes would shift responsibility and cost from those that create the original legislation to those who must exercise the veto. For example, Members of Congress could become even more responsive in the legislation that they write to interest group and constituency client demands while hoping that the President will strike out the offending passages or that one or both Houses of Congress would modify regulatory excesses created pursuant to the enabling legislation. But such hopes place too great a burden on the President and on subsequent legislative decisionmaking. The resulting incentives would encourage the kind of interest-group-based and constituency-based legislation that we have decried.

A third set of proposals concerns federalism. Once again, our framework provides a method of analysis. In principle, federalism is highly desirable. The correct pricing and output of public goods production and public bads suppression are difficult matters. The free-rider problem hinders our ability to get people to reveal their true preferences so that we can charge them for services rendered. Having many competing State and local governments to produce public goods and services would diminish this problem. Competition for citizens would drive these governments to eliminate waste and beneficially to reflect local variations in tastes and values. I agree with this approach.

The pork barrel is another side of federalism, however. It grants inefficient benefits to particular constituencies. True federalism requires that we stop this process. Otherwise, individual constituencies in State and local governments become interest groups in their pursuit of divisible benefits. If a program is worth its cost to the constituencies that consume it and must also pay for it, then they will choose it. If not, and if they cannot get taxpayers elsewhere to foot the bill, then the program will not be created. The surviving public policies will increase efficiency in human welfare.

I greatly fear, however, that what I mean by federalism and what federalism has come to mean are very different animals. Federalism now denotes a pattern of grants that belie the larger purpose for which federalism was intended. To the greatest extent possible we should eliminate subsidies to State and local governments and to individual congressional constituencies.

I'd like to close by offering two sets of proposals that strike me as superior to those just discussed.

First, we should return to the constitutionally described process for making law. This process has two parts. First, "No money shall be drawn from the Treasury, but in consequence of appropriations made by law," article I, section 9. My reading of this clause to the Constitution compels that programs creating automatic expenditures lasting beyond the life of a single Congress ought not to be allowed. Once laws are passed to make such continuing expenditures, usually increasing over several years, they transcend themselves to become entitlements or uncontrollable expenditures which contravene the purpose of a government of laws. Moreover, a failure to adhere to the narrow meaning of this clause allows present legislators to create private benefits in perpetuity. Future generations which must pay for this practice go unrepresented and the cost is spread across time with ease. The political return on this practice must be immense. Once such laws are passed they become almost untouchable and despite changing economic circumstances, taxpayers are strapped to a set of programs made years ago.

The second proposal in this set is a resurrection of the delegation doctrine in constitutional law, which holds that delegated authority cannot be further delegated. Delegates cannot create delegates.

The foundation of consent of our constitutional order requires that the Members of Congress should make laws, not administrative and regulatory agencies and bureaus. The Members of Congress need not get involved in administrative tedium. Rather, they must settle the fundamental political questions now delegated to the agencies.

Elsewhere, I have traced out the virtues of this approach to the regulatory problem. It would reduce the amount of private benefits created by regulating and would direct that process toward the public purpose. The regulatory process would no longer be available for politically profitable manipulation by individual committee and subcommittee chairmen in the Congress to use it to avoid the full constitutionally specified legislative gauntlet. Instead, particular regulations would have to gain widespread legislative support. The delegation doctrine would also visit on the members of the legislature the full political costs of the regulations that they now implicitly sanction by delegating the job of legislating to politically unaccountable bureaus and agencies.

Absent a realignment of the Supreme Court toward the imposition of these two proposals, my advice seems largely hortatory. Finally, a more effective constitutional change might be a balanced budget amendment simultaneously limiting taxes. In the past, increases in economic activity and therefore taxes have enabled the President and the Members of Congress to write more private benefits legislation. A cap on taxes and a balanced budget amendment providing for deficits voted on by supermajorities in the Congress or pursuant to a declaration of war would remove the national government's ability to write new private benefits legislation without removing some preexisting programs. Political opposition from the beneficiaries of these programs would stop the process. Political entrepreneurship would no longer be as rewarding as it is now and the Members of Congress would have an incentive to turn their special talents toward the enactment of truly public-regarding legislation.

I'd like to propose a strategy of experiment in enactment. The tax limit-balanced budget amendment might gain life by a demonstration of its virtues. This administration could impose the amendment's terms without it becoming part of the Constitution. The President might announce that he would veto any legislation that would have been forbidden had the amendment been adopted. Since it would require a two-thirds vote of both Houses of Congress to overturn the veto, we would have a close natural experiment of the amendment's effect. If such an abrupt strategy were viewed as too disruptive, the President could establish a trajectory of taxes and spending to bring the budget in balance by fiscal year 1987. He would then veto any bill that exceeded the limits that such a trajectory might require. Indeed, he might begin this policy now and use the 1984 Presidential election as a national referendum on it.

If the administration is serious about the balanced budget amendment, then this strategy makes good sense. Those who regard the amendment as a potential economic catastrophe might even support the President's strategy as a compromise because it does not bind the national Government in perpetuity.

The balanced budget amendment and a close adherence to constitutional forms in legislation are examples of self-denying ordinances. The Constitution is full of them. The founders must have believed that majoritarian legislatures might go too far in overturning the original social contract or in intruding on matters best left private and unregulated. Furthermore and more important perhaps, majorities in the population are not equivalent to majorities in the Congress. Otherwise, I believe our budgets would tend toward balance, our regulations would be efficient, public-regarding and nonintrusive, and our State and local governments would be competitive producers of goods and services that finance their own activities.

Mr. Wylie, thank you for the opportunity to be here.

Representative WYLIE. Thank you very much, Mr. Aranson, for an excellent, thought-provoking statement. We'll get into some questions a little later on.

[The prepared statement of Mr. Aranson follows:]

PREPARED STATEMENT OF PETER H. ARANSON

Not long ago, my new colleague, Professor Jimmy Carter, occupied the White House. With the nation facing double-digit inflation, increasing unemployment, and few prospects for improvement, he spoke to us of a national "malaise." Then-President Carter found the source of these problems in the private sector, among ordinary citizens and organized groups. Now-Professor Carter locates the cause of the present discontent with those who populate his former offices and in the government generally. Professor Carter's newly-gained wisdom may reflect the enriched intellectual environment of the halls of academe, as compared with what some may regard as the intellectually impoverished circumstances found in the halls of government. But the distinguished members of this Committee, by holding these hearings on the political economy of Constitutional reform, give evidence of an understanding about the causes of the present discontent that Jimmy Carter gained only upon leaving Washington.

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That understanding holds that unacceptably high rates of interest, unemployment, and inflation, uncontrollable Federal deficits and government spending, a decline in industrial activity, and a widespread despondence about matters economic may not have arisen solely from the activities of private citizens in their economic and social capacities. Nor do they come about because the Japanese are willing to sell us automobiles at a price below their production cost or because Common Market nations subsidize the diets of their trading partners. Nor, for that matter, is the aggressive intent of the Eastern Bloc the source of growing economic penury among our people. Instead, a serious discussion of Constitutional alternatives by the members of this Committee shows that those who govern us have concluded that they might govern us better (and perhaps less) if the organic law that controls their actions would constrain them differently, to produce only that legislation which is public-regarding.

I join in that conclusion and applaud the members of this Committee for having reached it. This hearing seeks to trace out the manner in which present Constitutional constraints and incentives lead the President and the members of Congress to make laws that do not promote the general welfare of the citizenry. A rich American literature on this subject, beginning with the Federalist Papers and reaching to the present day, makes it plain that Constitutional arrangements do substantially affect how our elected officeholders conduct the people's business and thereby advance or fail to advance their interests.

Recent years have seen a substantial increase in the volume of that literature and in proposals for Constitutional change. Here, I assess the strengths and weaknesses of some of those proposals. But first we must agree on what we are trying to accomplish in the public sector and then identify the reasons that we have failed in the accomplishment. Only then can we discern the standards against which to judge various proposals for Constitutional change.

I. THE PUBLIC PURPOSE

There has emerged a remarkable consensus, devoid of ideological content, among most economists and a growing number of political scientists, concerning which public-sector activities are appropriate and which are not. For example, I find among my colleagues very few supporters of subsidies for tobacco growers or of regulations protecting the trucking industry from competition. Similarly, academic approval is widespread for recent legislative successes such as airline deregulation. These kinds of judgments grow out of an increasingly coherent view of what we should and should not expect from the public sector. A summary of those expectations is helpful.

First, the marketplace may find it difficult to produce what economists call public goods. These are goods and services such as national defense and public peace, which are supplied to everyone by virtue of their production. They cannot be withheld from those who do not pay for them, and the addition of more consumers of these goods does not diminish the supply available to prior consumers -- there is no crowding. Free-rider problems may plague the private-sector production of such goods and services, because we cannot withhold them from those who will not support their production. Hence, we turn to government to supply these goods by enforcing an implicit contract through the process of democratic decision making and consent. Of course, only those public goods should be produced whose benefits exceed their costs. They should be produced in efficient amounts. And, they should produced only by the level of government at which they are consumed.

Second, we ask government to suppress the production of public bads, such as air and water pollution. Since clean air and pure water are public goods themselves, they share in the same problems of production that beset the private sector with regard to public goods. Similarly, public bads should be optimally suppressed by efficient methods at the appropriate governmental level and only if the benefits exceed the costs.

Third, reflecting its original function, we look to government to establish and protect an optimal arrangement of property rights. While we commonly think of property rights as having to do with real property, more recent developments in political economy view as property rights several other aspects of economic and social exchange, such as rights to radio frequencies, air routes, and even the right of free speech.

Fourth, a somewhat more closely argued function of government is the promotion of competition in the marketplace. Extant economic theories of industrial organization today distinguish between horizontal and vertical integration of firms, sometimes condemning the first, but approving of the second, because of its efficiency characteristics. Nevertheless, control of monopolies remains a widely regarded public-sector function. And, many economists believe that it is a variant of the public-goods problem.

Finally, and again a matter that is closely and hotly argued, some scholars find in the public sector a method for redistributing wealth for the larger public purpose of producing a public good in public altruism: providing the insurance of a "safety net" for those who cannot support themselves. This, too, is a public good, for altruists benefit (free-ride) from other altruists' beneficence.

This overly brief description of public functions that scholars regard as appropriate oversimplifies the matter considerably. There are different public-sector technologies for achieving each of these public purposes. For example, in the control of pollution we might adopt command-and-control mechanisms, such as are currently in vogue, or a regime of effluent charges, off-set policies, and bubble regulations, which most economists would prefer to current arrangements. Similarly, scholars disagree about how deeply the agents of government should become involved in the establishment of property rights. For instance, current thinking holds that rights in broadcast frequencies ought to be auctioned off and forever after left to the marketplace, not regulated in day-by-day interventions. Nor should the creation of rights in transportation routes be a concern of government.

We need not settle here once and for all which of these functions is appropriate and which method of execution (or nonexecution) would best serve the people's purpose. We merely identify these functions and purposes and then proceed with the second problem, to show that our representative democracy, as presently constituted, finds it difficult or impossible to achieve them or to achieve them efficiently.

II. THE FAILURE OF REPRESENTATIVE DEMOCRACY

For the past several years, several of my colleagues and I have been involved in an intense intellectual pursuit of the causes of the failure of representative democracy: the failure of our public institutions to be arranged in a way that promotes any of these public-regarding purposes, except accidentally. This research and my study of the public sector as it actually operates persuade me not only that our theories are robust but also that the ship of state requires a Constitutional midcourse correction.

The civics-book view of representative democracy held that citizens formed preferences, say, for the production of various levels of public goods, that candidates for office perceived these preferences, created platforms on which they ran, were elected, came into the Legislature, and carried out the electorate's mandate. In this view, bureaucracies were highly scientific instruments for public administration in doing the public's bidding. Similarly, Courts protected our Constitutional liberties and "perfected" legislation. It is now apparent, both in theory and in practice, that this interpretation collapses under the weight of reason and evidence.

First, the summation of preferences in the electorate remains difficult without formal political organization. Compared with the unorganized, an organized group of citizens can contract more easily with elected officeholders, can make bargains at a lower cost, can monitor and enforce compliance both by the group's members and by the Legislators, and can anticipate the effects of proposed public-policy changes even before the ink is dry. It is patent that the general electorate has no such capacity.

Second, and what is more important, a growing body of theory and evidence shows that to make a market in public policy requires that those policies are in some sense divisible, private, not public. That is, interest-group leaders and Legislators bargain back and forth in the coin of public policies that create some form of payment for both, which can be withheld from those not a party to the bargain. When confronted with some kind of a political limitation on their ability to affect legislation, interest-group leaders will use their scarce political resources to lobby for programs that provide private, divisible benefits for their group, leaving the "public interest" in public goods unrepresented. The incentives underlying this choice grow out of a group's inability to receive payment for the political pursuit of pubic goods -- goods that cannot be withheld from groups who do not contribute to this particular form of political action. Hence, private- and public-sector failure to create optimal levels of public goods are identical phenomena. As a consequence, groups use political action to pursue largely private programs, private goods, at collective cost. Plainly, no other interest group is likely to oppose this process, because to do so would use each group's scarce resources to create a public good: the reduction in the burden that such programs would place on the rest of the economy.

Finally, if these programs were truly efficient, then organized groups would probably buy them in the private sector. But, they would sequester their scarce political resources to pursue inefficient public programs that create divisible goods and services whose costs can be spread across the population in general. The result is a highly particularized form of legislation, the inefficient collective provision of private benefits, which bears no relationship to pristine theories about appropriate public-sector action.

But what is an organized group? It is any collection of citizens who, sometimes with the aid of legislation, have surmounted the problems of organizing and maintaining a structure sufficient to enter into public-policy bargaining. In this sense, economic firms are organized groups, as are labor unions, professional groups, government bureaus themselves, and more recently, state and local governments and Congressional constituencies, whose organization is maintained in each and every office on Capitol Hill.

Equally robust and increasingly provocative models and theories concerning Legislators', and Executive Branch -- bureaucratic -- responses to this process argue persuasively that the interests of Legislators and bureaucrats perfectly overlay those of the organized groups whom they represent. For instance, mathematical models of the legislative process, not to mention a virtual deluge of case studies and more general studies, convince us that the principal legislative task today is the creation of private, divisible benefits for well-identified groups in the population, at collective cost. Scholars of the Congress contrast "universalistic," "programatic," and "public-regarding" legislative action, the kinds of activities that fill up civics-book descriptions of representative democracies, with "case work," "the pork barrel," and "particularized" legislation, the sort that we expect to find in the view that has gained the status of conventional wisdom.

Closely paralleling this work on Legislatures, studies of bureaucracy strongly argue that the administrative aspects of our Democracy sustain and reinforce the public sector as a producer of private benefits at collective cost. Some of the resulting programs benefit the bureaucrats themselves. For instance, with respect to housing programs, pollution control, and welfare, economists and a growing number of political scientists believe that self-enforcing and self-actuating programs, incentive-based schemes, such as effluent charges and a negative income tax, are far superior to present command-and-control administrative arrangements. They would also require a substantially smaller federal payroll. Not surprisingly, administrative and Executive Branch agencies resist such proposals and as well join with constituency groups to promote the production of private-goods legislation. George Will has characterized the resulting public policy conundrum with th elegantly mixed metaphor of "iron triangles rolling logs into pork barrels.'

The evidence of this process seems apparent. Many groups create a popularized language to show how supporting their particular programs woul be in the public interest. More commonly, some ostensively public-regarding program becomes so distorted as a vehicle for producing private benefits at collective cost that it only remotely resembles its original theoretical purpose. For example, every manned bomber decision to come out of the Congress is interpreted in my State and Congressional District, and I imagine in the State of Washington as well, according to its impact on the local economy, not by its contribution to national defense. More recently, the proposed gasoline tax has been theoretically divvied up before it has been enacted or collected, in a manner that bears no relationship to a public purpose, but that does bear a very clear relationship to a political program for creating divisible benefits at collective cost. The largest part of EPA's budget is allocated not to pollution reduction but to pork-barrel legislation creating benefits for identifiable Congressional districts. The story goes on and on, and I need not lecture the members of this Committee on a process that they know and understand all too well. That the result is inefficient, that it bears no relationship to a public purpose, and that it perverts our most deeply cherished expectations concerning the public sector and undermines faith in government seem painfully evident.

Even when they struggle with larger economic problems, those who steer the ship of state often guide it not to safe harbors but to rocky shoals where it founders until a rising economic tide frees it until the next storm. For example, how do we respond to present unacceptably high levels of unemployment? We promote protective legislation for traditionally cyclical industries, such as automobile manufacturers, whose workers already earn a wage premium to compensate them for the cyclical nature of their employment. We create special subsidies for the construction industry through tax rebates for those who would buy new homes. We subsidize a huge welfare industry of administrators and caseworkers. Employees in industries buffeted by foreign competition get direct relief and tariff protection (or threatened protection), perpetuating a continued disdain for the law of comparative advantage. Public-sector attacks on unemployment thus respond to group demands, not to the demands of the structurally unemployed, who usually do not belong to organized groups. They go unserved.

How do we respond to high interest rates? Besides berating the Federal Reserve Board (perhaps with good reason), the members of Congress promote regulatory bailouts for banking institutions and subsidies to the construction industry.

How do we respond to an uncontrollable Federal deficit? To the extent that the members of Congress do anything about the deficit, they go after those the programs serving groups in the population who are least well organized and least capable of responding politically. Well organized groups with preexisting programs remain relatively unscathed. In sum, with regard to unemployment, interest rates, or deficits, our present legislative efforts bear no resemblance to a coherent economic policy.

III. PROPOSED SOLUTIONS

Many scholars interested in the problem of public-sector failure are struck by how the public treasury and other public-sector resources have come to resemble a common resource, such as a public pasture, clean air, or pure water. Since no clear property rights exist to these resources, people have an incentive to overuse them. The problem of rearranging our political institutions at a Constitutional level -- like the problem of reducing pollution, the overuse of a common resource -- may thus be solved by finding a way to visit the costs of their actions on those who undertake them. That is, we must find some way to stop the cost-spreading and responsibility-shifting that so characterizes representative democracy as practiced today.

The Committee has asked me to respond to several proposed Constitutional reforms and as well to give my own views on those reforms that I regard as desirable. The first of these proposals is the option of moving toward a parliamentary system and lesser reforms concerning closer links between the Executive and Legislative branches. Proponents have argued that a more unified government would be better able to execute decisive economic policy action when needed. Of course, this proposal would strike at the heart of the separation-of-powers doctrine, which undergirds our Constitution and much of Western political philosophy.

There are many problems with this proposal, but here I concentrate on those problems that find reflection in the framework of analysis just reported. In particular, the proposal does not get at the central problem of finding a way to reflect citizens' preferences for economic policy generally, rather than only the preferences of those who happen to be well organized at the moment. In a unified parliamentary system, such as Great Britain's, some organized groups might go unsatisfied, because a relatively smaller number of points of access (compared to the wide availability of points of access in our system) would make it more difficult for each group to get a hearing from elected Federal officials. That reduction in points of access, in turn, will create scale economies in political organization. That is, more and more groups will bind together in overall umbrella organizations whose purpose it is to overcome the reduced opportunities for political access. When this process reaches equilibrium, we can expect a few very large interest groups to survive, perhaps one made up of organized labor, and another, organized industry. They will compete for the collective production of divisible benefits, but now at a much larger scale. Of course, this scenario describes precisely what has occurred in Great Britain: the development of something akin to class warfare at the national political level. I do not recommend it.

Furthermore, there is little evidence that Great Britain or other parliamentary governments have had any greater success at executing decisive economic policy action than has the United States. Indeed, our relative robustness in economic matters may reflect the Federal Government's inherent inability to control the economy. A preference for "decisive economic policy action" in and of itself is at best a preference for neutral change. It assumes that we can fill up the details with some kind of economic policy action that makes sense. I do not believe that the Federal Government, either in its present form or reconstituted as a parliamentary system, can generate the kind of information, control mechanisms, responsiveness, and innovation that prevail in a decentralized marketplace. "Decisive economic policy action" might thus be a blueprint for catastrophe.

A second set of Constitutional reform proposals concerns Presidential line-item vetoes and Legislative vetoes of agency rule making. Again, the framework reported here provides a means for investigating these proposals. Each rests on the assumption that Federal intervention in economic matters would decline if the respective veto power were adopted. But no such conclusion seems warranted. For example, a recalcitrant President could use the threat of an item veto against particular legislatively mandated programs to get the Congress to go along with less desirable programs that he himself prefers. The result would be a kind of inter-branch log rolling, which could increase public-sector size and intrusiveness. A legislative veto of agency rule making could create the same kind of incentives. Moreover, I believe that there is a better solution for the kind of regulatory excesses that the legislative veto is aimed at correcting, and I shall describe it presently.

The worst problem with the line-item and legislative vetoes is that they encourage a shift of responsibility and political costs from those who create the original legislation to those who must exercise the veto in a controlling capacity. For example, members of Congress could become highly responsive in the legislation that they write to interest-group and constituency-client demands, while hoping the President to strike out the offending passages or while expecting that one or both Houses of Congress will modify regulatory excesses created pursuant to the enabling legislation. In my view, such hopes and expectations place too much of a burden on the President and on subsequent Legislative decision making. The resulting incentives would only serve to encourage the kind of interest-group-based and constituency-based legislation that we have decried.

A third set of proposals concerns federalism and fiscal choice. Once again, our framework provides a method of analysis. In principle, federalism, the devolution of political power to state and local governments, is highly desirable. The correct pricing and output of public-goods production and public-bads suppression are very difficult matters, both in theory and in practice: the overriding free-rider problem hinders our ability to get people to reveal their true preferences, so that we can charge them for services rendered. One way to reduce the scope of this problem is to have many competing governmental units -- state and local governments -- produce the relevant goods and services. Competition would drive these governments to eliminate waste and beneficially to reflect local variations in tastes and values. I agree with this approach.

Even in Woodrow Wilson's day, however, the pork barrel was a way for individual constituencies to receive benefits divisible by constituency at the cost of the rest of the nation. True federalism and the benefits flowing from real inter-polity competition require that we cut the connection between those governments and constituencies and the Federal Treasury. Otherwise, individual constituencies and state and local governments come to resemble interest groups in their pursuit of divisible benefits supplied at collective cost. If a program is worth its cost to those who consume it but must also pay for it, then they will choose it. If not, and if they cannot get the Federal Government -- the taxpayers -- to foot the bill, then the program will not be created. The resulting pattern of public policy will increase efficiency and human welfare.

I greatly fear, however, that what I mean by federalism and what "federalism" has come to mean at the national level are very different animals. "Federalism," or "the new federalism," has come to denote a pattern of grants that belie the larger purpose for which a federalism was intended. Accordingly, to the greatest extent possible, I would reduce all subsidies to state and local governments and to individual Congressional constituencies.

IV. PROPOSED SOLUTIONS

There is no perfect Constitutional solution or approach to the problems that beset us. Every proposal has its costs as well as its benefits. A truly costless proposal, one that creates net benefits for everyone concerned, would probably achieve immediate adoption. Therefore, it is important that people be candid about the strengths and limitations of proposals for Constitutional reform. In that spirit, I would propose two sets of reforms.

The first proposal is a return to the Constitutionally prescribed process for making laws. This proposal has two parts. First, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" (Article I, section 9). My reading of this Clause of the Constitution compels that programs creating automatic expenditures that last beyond the life of a single Congress ought not to be allowed. Once laws are passed to make such continuing expenditures, usually increasing over several years, they transcend themselves and achieve the status of "entitlements," or "uncontrollable expenditures," which contravene the purpose of a government of laws. What is more important, a failure to adhere to the narrow meaning of this Clause allows present sitting Legislators to create divisible, private benefits in perpetuity for particular groups in the population. Future generations, which must pay for this practice, go unrepresented. Hence, opposition is not as loud as it might be, and costs are spread across time with ease. The political return on this practice must be immense. Once such laws are passed, they become almost untouchable. Anyone who would assail these programs finds his activities opposed by strong veto groups in the Congress. And, despite changing economic circumstances, taxpayers are strapped to a set of programs made years ago.

The second proposal in this set is a resurrection of the Delegation Doctrine in Constitutional Law. This doctrine holds that delegates cannot make delegates; delegated authority cannot be delegated. The foundation of consent of our Constitutional order holds that the members of Congress bear the responsibility for making laws, not the personnel of various administrative and regulatory agencies and bureaus. The Delegation Doctrine does not require the members of Congress to get involved in administrative tedium. Rather, they must settle the fundamental political questions that they now delegate to the agencies.

Elsewhere, I have traced out the virtues of this approach to the regulatory problem. It would reduce the amount of private benefits created in the regulatory process and would beneficially alter that process toward creating only public-regarding regulations. The regulatory process would no longer be available for politically profitable manipulation by individual committee and subcommittee chairmen in the Congress, who thereby avoid the full legislative gauntlet. Instead, particular regulations would have to gain widespread legislative support. Furthermore, the Delegation Doctrine would visit on the members of the Legislature the full political costs of the regulations that they now implicitly sanction by delegating the job of legislating to politically unaccountable bureaucrats and regulators.

Absent a realignment of the Supreme Court toward the imposition of these two proposals, my advice seems largely hortatory. A more nearly effective Constitutional change is a Balanced-Budget Amendment that simultaneously limits government revenues. In the past, increases in economic activity, and therefore taxes, have allowed the President and the members of Congress to proceed apace with private-benefits legislation. A cap on revenues in a Balanced-Budget Amendment, with appropriate provisions for deficits voted on by super-majorities in the Congress or pursuant to a declaration of war, would remove the ability of the National Government to engage in these practices without simultaneously removing some private-benefits programs already on the books. Political opposition from the beneficiaries of these programs would thus stop the process in midstream. As a consequence, political entrepreneurship no longer would be as highly rewarded as it is presently, and thus the members of the Congress would have an incentive to turn their special talents toward the enactment of truly public-regarding legislation.

This proposal is not without its difficulties. There would be a tendency for the members of Congress to create benefits by using "off-budget" strategies, such as by increasing regulation of the private sector. For example, continuing difficulty with the Social Security system might generate legislation requiring private firms to create their own pension programs for their workers, under very stringent Federal regulations. However, that the members of Congress found it politically acceptable to develop an extensive government Social Security program, and not a highly regulated private-sector pension program as a substitute for Social Security, suggests that further impositions on the private sector are not as politically acceptable as the present program. There would clearly be opposition to such further impositions, and thus veto groups in the Congress would probably prevent this kind of substituting of regulation for direct government action.

The Revenue Limit-Balanced Budget Amendment might gain life by a demonstration of its virtues. This Administration could impose the terms of the Amendment without it actually becoming part of the Constitution. The President might announce that he will veto any legislation that would have been forbidden had the Amendment been adopted. Since a two-thirds vote of both Houses of Congress would be required to overturn the veto, we would have a close natural experiment of the Amendment's effects. If such an abrupt strategy were viewed as too disruptive, the President could establish a well publicized trajectory of Federal revenues and spending, adjusted to bring the budget in balance and constrain Federal taxing and spending by FY1987. He would then veto any bill that exceeded the limits that such a trajectory might require. Indeed, he might begin this policy now and use the 1984 Presidential election as a national referendum on it.

If the Administration is serious about the Balanced-Budget Amendment, then this strategy makes good sense. Those who regard the Amendment as a potential economic catastrophe might support the President's strategy as a compromise, because it does not bind the National Government in perpetuity. We might then find that future Presidents would commit themselves to vetoing budgets out of balance and the excessive growth of federal revenues, thus obviating the need for a Constitutional restructuring. If an overwhelming consensus emerged for an unbalanced budget, then of course that possibility would satisfy at least part of our expectations that legislation should be public-regarding.

The Balanced-Budget Amendment and a close adherance to Constitutional forms in legislation are examples of what William Riker calls "self-denying ordinances." The Constitution is full of such ordinances, both in the original text and in the Amendments. The underlying view of the Founders must have been that majoritarian legislatures might go too far in overturning the original social contract or in intruding on matters best left private and unregulated. Madison said as much in Federalist 10. But the problem remains that majorities in the population are not equivalent to majorities in the Congress. Otherwise, our budgets would tend toward balance, our regulations would be efficient and nonintrusive, our state and local governments would be competitive producers of goods and services that finance their own activities, and Professor Carter could rest assured that his people had achieved their best.

Representative WYLIE. Mr. Olson, you may proceed.

STATEMENT OF MANCUR OLSON, PROFESSOR OF ECONOMICS, UNIVERSITY OF MARYLAND, COLLEGE PARK

Mr. OLSON. Thank you, Congressman Wylie.

There are, all would agree, many aspects to the issues these hearings are about, but the aspect that seems to me the most important of all grows out of the extent of lobbies in our country. I believe that societies that have been stable for a very long time accumulate exceptional numbers of lobbies and that that's a particular problem here in the United States today.

Now, the incentives most of the lobbies have are not to seek to make the American economy or society more efficient and productive but, rather, to seek special favors. Really, for the most part, lobbying is a form of distributional struggle and this distributional struggle has costs in terms of a reduced efficiency of the economy as a whole.

I'm rather fond of the analogy to wrestlers battling over the contents of a china shop and breaking much more than they carry away.

Now, there isn't time to go into all the reasons why I believe this is so. I spelled some of them out in testimony before this committee in 1976 and more recently in a book on "The Rise and Decline of Nations." And I'd like to suggest that there is some problem, maybe a problem that's exaggerated at times, with the size of Government that grows out of lobbying. Lobbying will tend to make legislation more complicated, will sometimes strive to get subsidies, and the complexity of Government and the subsidies do make the Government somewhat bigger than it should be, at least in certain respects or in certain parts of the Government.

I would note, however, that, by and large, the poorest people in the society are not organized in lobbies. If one looks over the list of campaign contributions to Congressmen and Senators, one does not find huge contributions from any groups that represent the really poor.

Middle income people, blue collar people, may, of course, be represented and are represented in the powerful lobbies, but, by and large, not the very poor.

The same things that enable people to make a high income tend to enable them to become better organized. So, lobbying then, as I see it, does not have any tendency to help the poor and does not have any tendency to generate a more egalitarian distribution of income, very possibly the reverse.

Now, it's sometimes suggested that because of problems such as the problems I've discussed there ought to be a constitutional ban on unbalanced budgets or on a level of Federal spending which exceeds a certain percentage of the national income.

I think these constitutional recommendations are not a good idea. I do not think it would be workable to have a constitutional ban against unbalanced budgets or against Government spending that exceeded certain limits.

I think the desire to ban legislation that's unwise or spending that's unwise by a constitutional amendment can best be understood if we draw a comparison with the desire to ban other evils. If there's inflation, people will sometimes say, "Let's ban it with wage and price controls," but that doesn't get at the cause of inflation and tends to make the problem worse. If there's a problem of alcoholism, many people will say, "Let's have prohibition and outlaw it," but we know that didn't work.

Of course, you can have a constitutional amendment to ban the Congress from spending too much money or the Government for running a deficit, but this constitutional law would not, in my judgment, be enforced in any circumstance where there was a strong tendency for unbalanced budgets or larger spending in any case.

One way of looking at this or one way of seeing the force of this argument is to look at countries that have had constitutions quite like our own and not followed them. The continent just south of us is full of countries, many of which have had constitutions quite as nice as our own but they have not lived by them.

Similarly, even in our own country, we know that in practice our Constitution has changed to a colossal extent. The Supreme Court really does follow the election returns, though admittedly with a lag, and that means that the way the constitution is interpreted in this country changes with the climate of opinion and there is no way, if the climate of opinion favors deficits or favors a higher level of Government spending, that a constitutional ban will stop it.

We've got to remember that there's no institution that's got the force to enforce the Constitution. If we set up a special army or police force for that purpose, who would then control that special army or police force? It's impossible to set up any mechanism which would insure that the Constitution is enforced even if the majority of the people would want something inconsistent with the constitution.

To the small extent that constitutions can be enforced, and to the extent that constitutions like our own have lasted and made a contribution even as they have evolved, that's because of the strength of minorities. The majority is what has to be constrained. The majority is bound to be stronger than the minority, but that doesn't mean that the minority is completely powerless.

The fact that our Constitution has lasted as long as it has and has had such an impact as it has had is due in part to the diversity and size of the country. Regions with minority views—one thinks particularly of the South before the Civil War—have been able to some extent to restrain democracies.

Countries with very limited government like Switzerland above all are countries of great diversity. The Swiss are made up of people, some Catholic, some Protestant, some speaking French, some speaking German, some speaking Italian, and they're all of them more or less in mountain redoubts and the majority of the Swiss cannot put down the minority of the Swiss, and that's one reason the Swiss have an extremely restrictive constitution that has lasted quite a long time.

So, I would suggest that while indeed we do need to worry about lobbying and the tendency of lobbying to make Government more complex and even to lead to some programs which involve a gratuitous expansion of the Government, it seems to me that we cannot solve the problem simply by passing a law, even a constitutional law, against it. There is no evidence in history that this will work in our own country or abroad.

The only solution, as I see it, is better understanding of the problem so that the American people greet special interest pleading with the skepticism it deserves.

Representative **Wylie**. Thank you very much, Mr. Olson, for an impressive statement.

It would seem that there is an apparent difference of opinion on the panel that we have here this morning and when we called these hearings on the political economy and constitutional reform and I rather anticipated that that might be the case.

But if I may summarize for just a minute, apparently nearly everyone agrees that there are certain things that, for one reason or another, must be provided by the Government at some level. Such things include the establishment and maintenance of a legal structure, national defense, and certain other public goods. However, when the scope of the Government expands much beyond the common interest, whatever that might be, problems then emerge which endanger our republican system of government and our society. Attempts of Government to improve the status of selected special interests at the expense of others often lead to contradictory policies. I think you would agree that that's a fair statement from what you have said.

The random, pell-mell nature of such Government intervention can divide and balkanize representative institutions and distort the economy. All too often the result is what one economist has called planned chaos, a situation which no one wants and one that could result in a loss of confidence in our constitutional system.

Mr. Aranson, you referred to James Madison and his Federalist No. 10. Well, I might refer to James Madison in his Federalist No. 51, in which he said, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." Since neither of these conditions are apt to appear any time soon, I'm glad we have a Constitution which recognizes the inherent limitations of human nature.

Of course, I'm not suggesting that the Government shouldn't do anything. I'm just noting that it can try to do more than it can do well.

In that connection, Mr. Olson, should Government attempt to make income distribution more equal? Are there any economic reasons which would suggest that we ought to do that?

Now you referred to Switzerland and I've been to Switzerland and I understand their form of government. They don't vote any program unless it's accompanied by a revenues measure and it's submitted to a plebiscite. But I would also suggest that their Government is a lot less complicated than ours. They're a country of 6 or 7 million people, which is about half the size of the State of Ohio, and here we are a Government of 220 million people—much, much more complex. So the analogy to the Swiss experiment might be lacking.

But what are the pluses and minuses of an economic policy which would provide for an incomes distribution? That's what you're sort of suggesting.

Mr. OLSON. Yes; well, I would argue that any income redistribution will tend to involve some loss in efficiency. The people who get the money may be induced to work or save less because they get it. The taxes themselves will have, by and large, an adverse effect on incentives.

Now with respect to the very poor, the needs of the very poor are so great and so urgent that it seems to me there is a case for some income redistribution to the poor notwithstanding the fact that it costs the society a somewhat larger sum than the number of dollars the poor actually received.

Now, to my mind, most of the income redistribution in our society is not to the poor. There is a general sympathy, a general humanity, which leads to political support for very modest provision for the poor, but a lot of the redistribution is from the poor to the middle-income people to the rich, from middle-income people to other middle-income people, and redistributions many of which have no egalitarian rationale, and I would argue that's because the organized strength in the political system is often in the hands of rather prosperous groups. Physicians, for example, are hardly the poorest Americans but they surely are among the most powerful and various arrangements that have been obtained for them and for hospitals have a cost to our society which much exceeds the cost of the entire welfare program, for example.

Now you mentioned Switzerland being much smaller than the United States and thus not an apt example, and I agree it is much smaller and very different. But it would be even harder to limit the Government constitutionally in a big country like ours than in a small one like Switzerland.

So the differences, to my mind, strengthen my argument that there is no constitutional fix that will substitute for wisdom.

Representative WYLIE. But if we provide a system of income distribution, either by regulation or by law, aren't we stifling the very thing that has made our country the best-fed, best-clothed nation in the world and able to provide for people who otherwise would not have these resources by stifling incentive, by stifling the incentive to better oneself?

Mr. OLSON. That's right. It's definitely true that if we take tax receipts and give them to people who are in a poor situation, it does impair incentives and I think no one can deny that. Now that's not the whole story. There's also the point that the very poor are sometimes in situations so desperate that they have a really rather intense need for the money.

And let me draw an analogy this way if I might, Congressman Wylie. When we buy insurance on our house, against our house burning down, that insurance policy does impair our incentives to prevent fire. We're not going to let our kids play with matches, but we may not unplug appliances when we leave on vacation. So fire insurance increases the chances of fire.

Representative WYLIE. I would disagree with that theory, but go ahead.

Mr. Olson. You would. Well, let me say—this is not proof, of course, but in the insurance industry there is the concept of moral hazard, the likelihood that the contingency against which a person is insured is increased by the likelihood of insurance, and that's one reason you can't buy insurance from the private sector against being unemployed. The insurance company knows that if you were insured against being unemployed you would have more of an incentive to loaf on the job.

Now my argument then is this: That, yes, there are impaired incentives in Government programs to aid the poor. Insurance, also, I believe, impairs incentives but yet we buy some. We ought, by the same token, to buy some income redistribution for the very poorest on the grounds they really need it, even though it costs us a bit more than the dollars they receive.

Representative Wylie. Well, that's an interesting thesis. If either of the other two witnesses would care to comment on that, I would welcome it. If you don't, I will go to another subject.

Mr. Niskanen. Well, I largely agree with my friend, Mancur Olson, on this matter in that the efficiency losses are only part of the story. I think most of us agree that we are a fairly generous nation and that we have concern about others and that we are prepared to pay some taxes to provide a safety net, so to speak, for others.

I think that the major crime about our Federal fiscal activities is that the distribution is not predominantly to those who are the least well off, but very largely to specialized groups who have especially important political influence. And so I don't deny either the authority or the appropriateness of using the Federal fisc for some means and some type of income distribution. I think that the most important argument is about the means and types and to whom it goes rather than the mere existence of such a measure.

Mr. Aranson. I might add to that that I agree with what Mancur Olson and Bill Niskanen have said. In a sense, we all read the same books.

Let me put the proposition differently, however, to shine another kind of light on it.

If we could somehow construct a national referendum on precisely what the income distribution or the wealth distribution of this country should look like when there would be no lobbying and no intervention of interest groups, or constituencies, or other kinds of organizations, and for that matter, no lobbying by those who would distribute the income—that is, the caseworkers, the welfare bureaucracy and what have you, which I believe is largely served by this process—I'm fairly certain and persuaded that the kind of welfare policies, the kind of redistribution that we would have under that imaginary system is entirely unlike anything that we have today.

We may even have more money going for welfare, more money going to something that looked like a negative income tax system, because each dollar would be more productive since you wouldn't have all of these intermediary groups taking their piece of the action.

So really a statement that we distribute money badly or that we redistribute it according to a chaotic system of who can grab first and best does not dispose of the question of how we actually should distribute it and to whom that redistribution should go.

I think we would all agree on the basis of some kind of an insurance principle chosen, as John Rawls said, "behind the veil of ignorance," that we might want to provide for those who can't provide for themselves. I don't think there's any question about that.

The question is, How does the present arrangement of our political system intervene in order to defeat those larger purposes that we would like to accomplish?

Representative **Wylie**. Well, I might say that's a very interesting thesis, that we might even put more into welfare programs or welfare systems if we had a pure, pristine vote on them without the intervention of any political pressure. Is that a fair analysis of what you just said?

Mr. **Aranson**. It's a guess. I wouldn't push it very hard, but it's merely to say that I don't know how much we would put in. It might be more. It might be less, but I'm certain that more would get to the poor.

Representative **Wylie**. Mr. Niskanen, you seem to feel that there is some political paralysis in Congress due to the weakening of the two-party system, if I may paraphrase. Am I stating your thesis accurately in that regard?

Mr. **Niskanen**. Yes; I trace this phenomena mostly to developments during about the last 20 years. I think it is primarily a consequence of the increasing dominance of primaries as a means of selecting candidates, and the development of public funding for campaigns, that has been reflected internally within Congress in a proliferation of subcommittees. My understanding right now is that there's roughly one subcommittee for every three Representatives in the House and one subcommittee for every Senator in the Senate. And both the House and the Senate leadership and the party leadership in each House have very much less influence over the activities of the rest of the Chamber than was the case some years ago.

That has increased the coordination problems within Congress and has also enormously increased the number of people with whom the executive branch has to deal to conduct business.

That development has all been rationalized and has been rather widely supported in the name of a broader, more representative democracy. I think, though, there is an increasing concern, particularly in the political science community in the United States, that those developments have reduced the effectiveness of democracy and have led to a near paralysis of Congress as an institution which can formulate or even effectively review complex policy issues.

Representative **Wylie**. Well, it might relate somewhat to the leadership in the Chief Executive's office now, and I think President Reagan has exercised very strong leadership and has been a very good communicator and has, by one process or another, established some rapport with Members of both Houses. He was able to get through almost his entire legislative program in the 97th Congress.

Mr. **Niskanen**. That is correct or was correct through about the first year of his administration and that's also been the case of the first year of prior administrations in that the President has some greater leverage in that first year, and President Reagan, of course, is a very effective communicator and has been able to deal with a larger number of people than was previously the case.

But as late as President Johnson, for example, the number of people with whom President Johnson had to deal in Congress could be counted on two hands in terms of doing the kinds of negotiations that are necessary to bring about substantive change in policy.

Now the executive branch must deal meaningfully with at least all of the effective subcommittee chairmen and, in turn, it's difficult where issues are complex to coordinate the action across these committees.

I'm not enormously confident about my conclusions or my analysis in this area. It's basically the result of work that other scholars have done. But I think that the conditions are serious enough to deserve very serious review in this body.

Representative **Wylie**. Well, I think your opinion deserves review. I think it might be the subject of some alternate thinking.

Mr. Niskanen, how well has the 1974 Budget Act worked?

Mr. **Niskanen**. Judging by outcomes, I would say rather badly, but I think that one should not attribute the outcomes entirely to the developments under the Budget Act. I think that our management of the Federal fiscal has deteriorated substantially during the same period as the Congressional Budget Act. I do not attribute that deterioration to the Congressional Budget Act, but it has clearly not alleviated it. I think that it serves the interest of the country for the Congress to be better informed about budgetary matters and I think the development of the Congressional Budget Office and the role of the two Budget Committees on net contributes valuably to this process.

I think the Budget Committees, by their nature, have a broader perspective and somewhat longer time horizon maybe than the specialized authorizing and Appropriations Committees.

For all of that, however, I think one should not count on that process to sort out what are very serious fiscal problems in the United States. I think we need other measures.

Representative **Wylie**. Mr. Aranson, you would agree that the Budget Act has not restrained Federal spending, I take it, from the nature of your testimony?

Mr. **Aranson**. I'm certain that it did not and does not. At the beginning of the Reagan administration I was asked to give a paper at Stanford Hoover Institution on the Budget Act and I proceeded to review the process of the act through its principal years which were the years of the Carter administration, and I said at that time that it was a dismal record of increasing unemployment, increasing deficits, and increasing inflation.

With the exception of the last measure of economic welfare, inflation, that process appears to have continued.

I might add to what Bill Niskanen has said that the political science literature on the subject of the organization of the Congress has gotten somewhat desperate in trying to figure out what to do about what everybody agrees is a pretty bad state of affairs. We're probably referring to the same literature, principally written by

Kenneth Shepsley, the scholar at Washington University, and I agree with a lot of the suggestions that have been made. For example, a reemergence of the Appropriations Committees with the Cannon-Taber rule that people don't sit on subcommittees on which they have an interest.

Another proposal is that the second budget resolution, if not made, would revert to the first resolution and that would stick and it would be adopted in law.

However, I think all of those are good ideas and I could sit here all day and spin them out, as could we all, but it occurs to me that when people adopt new rules such as the Subcommittee Bill of Rights, that they have in mind the policy outcomes that are going to occur as a consequence of those rules. So having chosen the rules, they choose the policy; but having chosen the policy, they choose the rules.

So there must be something about our current legislative arrangements that have a powerful attraction for the Members of Congress. I believe we've indicated it's the organized group basis of politics.

For that reason, I don't believe there's any such thing as a change that's going to improve all of our problems and so I don't believe, for example, the balanced budget amendment is a cure-all.

On the other hand, I've indicated that there are other changes I would like. I can't agree with Mancur Olson that it's like prohibition. He says it's like prohibition, but then so was the Bill of Rights; and indeed so is article I, section 9 of the Constitution prohibiting ex post facto legislation and a slew of other activities that the Congress must not engage in. And so if it is like prohibition, then that may be all right because so is the prohibition against Congress establishing a national religion, abridging freedom of speech, of press, of assembly, and so forth and so on; and perhaps some prohibitions work and others don't. That may not be the best prohibition of all, but I think it's one to which we ought to give serious consideration.

Representative **Wylie**. Very soon we're going to be struggling over a fiscal year 1984 budget again and the debate is very likely to be intense. We do need to, I think, get a handle on deficit spending. I think that's the cause of most of our problems and I'm not suggesting that you might be prepared to answer this; but do you have any suggestions, Mr. Niskanen, as to how we might approach that budget process?

Mr. **Niskanen**. Congressman Wylie, I, of course, can't speak for the administration on this matter. Our budget will be submitted in late January to reflect the decisions that have been made.

I do share the view, however, of a good many people in both the Senate and the House that the only way in which we are going to be able to resolve our really serious fiscal problems would be a common acceptence of a principle that everybody has to sacrifice something, and that I think we have almost reached the end of selective line-item budget cutting.

The overriding of the President's veto this summer, I think, was the strongest signal of that in that there seems to be very little tolerance any more for focusing budget cutting on the many hundreds of line items in what now represents only about 25 percent of the budget.

If you look at five major programs—defense, social security, medical care, interest payments, and veterans' payments—they now constitute about 75 percent of the budget and for the most part have been immune to effective budget review and discipline.

And Congress, possibly correctly, has said we cannot continue to cut the budget in those areas in the remaining 25 percent, and that if we are to have effective budget discipline it must be one area across the board.

Those are painful decisions, of course, but my sense is that something almost like what the Europeans call a grand coalition or a national coalition is necessary to have an effective attack on a very serious fiscal situation, and that grand coalition would have to be bound together at least for a time by a principle that everybody gets something less than what they want in order to resolve this issue.

The fundamental problem arises in that we have inconsistent preferences. It looks as if we want a level of Government spending that channels about 24 percent of our gross national output to the Federal Government but that we don't seem to want to be able to tax ourselves more than about 20 percent of our national output. Those are fundamentally inconsistent preferences, at least over any period of time. In any given year there's not any special problem about that, but those preferences are fundamentally inconsistent, arithmetically inconsistent, over any sustained period of time. And we either have to sort out whether we are prepared to tax ourselves more to finance the level of services that we want or that we are prepared to discipline the Government spending to the level at which we are prepared to tax.

That does not necessarily mean that we should or must have a balanced budget in every year, but the magnitude of the potential deficits are such that there should be no argument on the issue of whether they should be substantially reduced.

I would disagree with Mancur Olson on the question of the value of the Senate Joint Resolution 58 in the House version in the sense that I agree that it does not solve all fiscal problems. There are any number of problems that would remain. The biases and the mix between public and private goods provided through the Federal fiscal would substantially still remain.

But I think that it would represent a substantial improvement, and in that sense I would endorse the rule that defines a decision to borrow or a plan to borrow and a plan to increase the Federal share of our national output as decisions that should not be made inadvertently, which has been the case for the most part recently, or should not be made by normal political processes.

The proposed amendment, for example, precludes neither deficits nor an increase in the Federal share of our national output. It just says those decisions should be made by a speical political process requiring a broader majority and an overt, open, recorded vote on these matters rather than something which has for the most part just happened because of the growth of transfer programs which do not require annual appropriations, the growth of deficits without formal votes in many cases; and I think that our political system would operate better than it does now—not perfectly—if such an amendment were in place.

On the general question of whether constitutions are ever important, it is not clear to the most thoughtful scholars why constitutions in many cases do seem to be enforced. Mancur Olson is correct that most of the Latin American countries in effect copied the American Constitution and those constitutions have not proved to be binding. The Constitution of the Soviet Union as an abstract document is an interesting, in some ways almost commendable, document. These constitutions have not proved to be effectively binding in many dimensions of the Governmental behavior in those countries.

It is not clear why our Constitution has been as binding as it has been. At the same time, I think that it is too early to share Mancur Olson's despair about the possibility that constitutions can still be an effective expression of commonly accepted rules by which the Government does business.

Some of these rules are never written in the Constitution. We have never had a formal balanced budget rule, for example. But for about the first 150 years of our national experience we did not have significant borrowing except during wartime and we had an effective balanced budget rule that was not written into the Constitution.

I would not want to proceed on the assumption that any kind of rule that we would write into the Constitution would be overridden by short-term political expediency.

Representative WYLIE. Mr. Niskanen, I thank you very much for that very interesting discourse and, Dr. Olson and Mr. Aranson, if you would care to expand on that for the record, we would be glad to have that.

I am sorry to say that another vote is on. I appreciate very much your being here. I know Senator Jepsen would want me to say on behalf of himself and the other members of the committee, we thank you for taking time out to present what I regard as very worthwhile testimony. Your appearances here have indeed been most impressive and we thank you very much for taking the time.

The meeting of the Joint Economic Committee is adjourned.

[Whereupon, at 11:50 a.m., the committee adjourned, subject to the call of the Chair.]

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